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No. 05-___

IN THE

Supreme Court of the United States

JOHN D. CROWLEY,
Petitioner,

v.

UNITED STATES OF AMERICA.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred in its construction of the term "law enforcement officer" as it appears in the Federal Law Enforcement Pay Reform Act when, rather than apply the explicit and unambiguous definition Congress provided, it imposed requirements not contained in the statute, included a requirement specifically repealed by Congress, and ignored the implementing agency's regulations defining the term?

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PETITION FOR A WRIT OF CERTIORARI

John D. Crowley hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The decision of the court below reversing the United States Court of Federal Claims was entered on February 17, 2005 and is reported as *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005). *See* App. A at 1a. The petition for rehearing and rehearing *en banc* was denied on April 27, 2005. *See* App. B at 25a.

This case arose in the Federal Circuit on appeal of a decision of the United States Court of Federal Claims. The trial court's decisions are reported at *Hannon v. United States*, 48 Fed. Cl. 15 (2000) (App. F at 174a); *Crowley v. United States*, 53 Fed. Cl. 737 (2002) (App. E at 55a);

Crowley v. United States, 56 Fed. Cl. 291 (2003) (App. D at 40a); and *Crowley v. United States*, 57 Fed. Cl. 376 (2003) (App. C at 26a).

JURISDICTION

This case arises on petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit. The court below reversed the United States Court of Federal Claims' decision holding that petitioner was a law enforcement officer and therefore entitled to enhanced pay under the Federal Law Enforcement Pay Reform Act, 5 U.S.C. § 5305 note. This petition is filed within the time allowed by law. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 5305 note provides:

> [E]ffective on the first day of the first applicable pay period beginning on or after January 1, 1992, each law enforcement officer whose post of duty is in one of the following areas shall receive an adjustment, which shall be a percentage of the officer's rate of basic pay, as follows:
>
> Area — Differential
> Boston-Lawrence-Salem, MA-NH Consolidated Metropolitan Statistical Area..... 16%
>
> . . . .
>
> Washington-Baltimore, DC-MD-VA-WV Consolidated Metropolitan Statistical Area... 4%

Title 5, United States Code, Section 8331(20) provides:

> "[L]aw enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the

United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

STATEMENT

Since 1947, Congress has provided special benefits for federal law enforcement officers.[1] While at first these benefits were limited to Special Agents of the Federal Bureau of Investigation, in 1948 Congress broadened this coverage to apply to essentially all civilian government employees "the duties of whose positions are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the United States."[2] This language remains as the core definition of "law enforcement officer" in effect today.[3] In 1990, Congress provided federal law enforcement officers with enhanced pay, including increased locality pay in certain urban areas.

Petitioner was a Diversion Investigator employed by the Drug Enforcement Administration. He and his coworkers spearheaded a major component of the government's war against drugs. Unlike their Special Agent counterparts, Diversion Investigators do not focus their investigations on illicit drugs, but instead on legal pharmaceuticals diverted into illicit channels.

The Diversion program was created in the 1970s as part of the Drug Enforcement Administration's (then the Bureau of

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[1] *See* Pub. L. No. 80-168, 61 Stat. 307 (1947), providing for early retirement for Special Agents of the Federal Bureau of investigation.

[2] 62 Stat. 1221 (1948).

[3] *See* 5 U.S.C. § 8331(20) (definition of "law enforcement officer" under the Civil Service Retirement System); 5 U.S.C. § 8401(17) (definition of "law enforcement officer" under the Federal Employees Retirement System.) The FERS definition further provides that such positions should be "sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals."

Narcotics and Dangerous Drugs) implementation of the Controlled Substances Act.[4] During the 1960s and early 1970s, diversion of legal pharmaceuticals was rampant—a Congressional committee concluded that nearly half of all the amphetamines and barbiturates manufactured in the United States were diverted into illicit channels and DEA estimated that roughly two thirds of all drug-related deaths and injuries in the country were caused by drugs diverted from the lawful market.[5] Stories about "diet pills" and tranquilizers were common media fare and the tragedy of Karen Ann Quinlan, whose coma was popularly attributed to abuse of quaaludes and alcohol, dominated the media for months.[6]

DEA tasked its Diversion Investigators with the primary responsibility for investigating the diversion of licit pharmaceuticals at the retail, or practitioner, level. Diversion Investigators investigated physicians, clinics and pharmacies for purposes of pursuing criminal prosecution. In 1975, this Court decided a diversion case, holding that a physician could be prosecuted under § 841 of the Controlled Substances Act.[7] In 1980, DEA reported that Diversion Investigators had identified 94 priority retail targets in 23 major cities resulting in 28 convictions with additional indictments outstanding. The first 20 physicians convicted were responsible for di-

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[4] *See* Pub. L. No. 91-513 (1970), 84 Stat.1242, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[5] *See* "Evaluation of the Diversion Control Program," U.S. Department of Justice Drug Enforcement Administration Planning and Inspection Division (May 1, 1983), *Hannon v. Department of Justice*, No. 99-3354 (Fed Cir.), Joint Appendix at 202, 211).

[6] *See e.g.*, Gilbert Cant, VALIUMANIA, *N.Y. Times Magazine* (Feb. 1, 1976); KAREN'S PRECEDENT, *Time Magazine* at 50 (Apr. 12, 1976); "In the Matter of Karen Ann Quinlin," (Warren V. Bush Productions 1977) (a made-for-television movie).

[7] *United States v. Moore*, 423 U.S. 122 (1975).

verting over 18 million dosage units of scheduled drugs.[8] Diversion investigations continue to this day.[9]

Petitioner Crowley is typical of the Diversion Investigators DEA has employed. Mr. Crowley was assigned to and spent over fifty percent of his time working on criminal investigations, investigating criminals or suspected criminals for violating the criminal laws of the United States by diverting controlled substances into illegal channels. The judge who heard the evidence concluded that Crowley satisfied the statutory standard and that "Mr. Crowley's duties consisted primarily of investigating individuals suspected or convicted of offenses against the criminal laws of the United States." App. E at 133a.

Notwithstanding these findings, the court below reversed the trial court's finding that petitioner was a "law enforcement officer" because it said that Mr. Crowley did not show that his position was hazardous and required vigor. App. A at 21a-23a. As such, the court below refused to award Mr. Crowley enhanced pay.

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the construction of the statutes that govern compensation for federal law enforcement officers. As the Federal Circuit has exclusive jurisdiction over claims arising under these statutes, there is no active circuit split on this issue. Nonetheless, there are thousands of federal employees

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[8] *Hannon v. Department of Justice*, No. 99-3354 (Fed Cir.), Joint Appendix at 223.

[9] Yesterday's diet pills and quaaludes have moved over for today's methamphetamine. *See, e.g.*, Kate Zernike, OFFICIALS ACROSS U.S. DESCRIBE DRUG WOES, *N.Y. Times*, July 6, 2005, at A12; Kate Zernike, A DRUG SCOURGE CREATES ITS OWN FORM OF ORPHAN, *N.Y. Times*, July 11, 2005, at A1.

in dozens of federal agencies who, by the plain terms of the statutes, qualify for law enforcement officer compensation, and hundreds of these employees have active claims for such benefits.

With its decision below, the Federal Circuit has flouted Congress's unambiguous and explicit terms, ignored the pertinent regulations of the Office of Personnel Management, and reversed the trial court's findings when it had previously held that such findings were "judgment calls" within the discretion of the trial court. Review by this Court is necessary to provide guidance on this issue of vital importance to thousands of current and future law enforcement officers and ensure that the court below gives proper respect to Congress and the administrative agency with delegated authority to implement the statutes at issue here.

1. The Federal Circuit has issued seven decisions over the past eight years seeking to apply Congress's explicit definition of the term "law enforcement officer."[10] In each of these decisions, the Court has strayed from the plain language of the statute and OPM's implementing regulations. Its most recent decisions criticize their predecessors, but refuse to disavow them. Instead, they merely formulate new and additional criteria, further obscuring the statutory standard. Review by this Court is necessary to give effect to Congress's expressed intent and resolve an issue that has perplexed the court below for years.

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[10] *Crowley v. United States*, App. A; *Koenig v. Department of Navy*, 315 F.3d 1378 (Fed. Cir. 2003); *Hall v. Department of Treasury*, 264 F.3d 1050 (Fed. Cir. 2001); *Gallagher v. Department of Treasury*, 274 F.3d 1331 (Fed. Cir. 2001); *Watson v. Department of Navy*, 262 F.3d 1292 (Fed. Cir. 2001); *Hannon v. Department of Justice*, 234 F.3d 674 (Fed. Cir. 2000); *Bingaman v. Department of Treasury*, 127 F.3d 1431 (Fed. Cir. 1997).

For federal retirement purposes under the Civil Service Retirement System, Congress defined a "law enforcement officer" as an "employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."[11] In *Bingaman*, after characterizing this definition and OPM's regulations as providing "only the most general guidance," the court endorsed a six-factor test that included such unrelated inquiries as whether the employee carried a weapon and worked for long periods without a break.[12] In *Hannon*, after making a point to disavow genesis of the *Bingaman* factors, the court went on to add a seventh factor–hazard.[13] In *Watson*, the court recognized the infirmity of *Bingaman/Hannon* approach and, in the name of greater fealty to the language of the statutes and regulations, endorsed an entirely different approach, with five new factors.[14] Just the same, the court advised that the *Bingaman* factors could still be used "as necessary and appropriate."[15] In *Hall*, which was decided a month after *Watson*, the court reverted wholly to the *Bingaman* analysis and declined to mention *Watson*.[16] Then, in *Koenig*, the court returned to the *Watson* analysis, without distinguishing *Hall*.[17]

Most recently, in *Crowley*, the court found that the myriad and conflicting factor tests in the aforementioned cases boil down to only two factors that now "predominate over all others"; the "physical vigorousness" and the "hazardousness"

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[11] 5 U.S.C. § 8331(20).

[12] 127 F.3d at 1436.

[13] App. A at 4a.

[14] *Watson*, 262 F.3d 1292, 1303 (Fed. Cir. 2001).

[15] *Id.*

[16] 264 F.3d at 1056.

[17] *Koenig*, 315 F.3d at 1381.

of the position. App. A at 16a. Despite the fact that 5 U.S.C. § 8331(20) makes no mention whatsoever of vigor or hazard, *see Obremski v. Office of Personnel Mgmt.*, 699 F.2d 1263 (D.C. Cir. 1983), the panel found that "vigorousness" and "hazardousness" now **must** be present to gain LEO status. App. A at 17a. Further, the court emphasized that the inquiry should be "whether or not a position, not an employee, is entitled to LEO status." App. A at 15a. The court stated that "evidence of an individual employee's activities will be considered insofar as it substantially conflicts with our position determination." *Id.*

Each of the court's decisions is flawed at a fundamental level. *Bingaman*'s principal flaws, that its announced standards are not derived from the statute and do not distinguish between law enforcement officer duties and other duties, was recognized by the court in *Watson*.[18] In *Hannon*, the court held that the degree of hazard faced by the employee was a consideration in determining law enforcement officer status and a "permissible gloss on the statutory language."[19] Yet, as the District of Columbia Circuit previously held, Congress "made clear that the degree of hazard to which an employee is exposed is irrelevant to his 'law enforcement officer' status."[20] *Watson* adopted a standard that purportedly is "more faithful to the language of the statutes and regulations,"[21] but in fact at most substitutes different extra-statutory standards for the discredited (but not disavowed) *Bingaman* factors. Finally, *Crowley* purports to distill the previous conflicting factors into two "predominant" and mandatory factors; vigor and hazard, neither of which are

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[18] *Watson*, 262 F.3d at 1302-03.

[19] *Hannon*, 234 F.3d at 677.

[20] *Obremski v. Office of Personnel Management*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983).

[21] *Watson*, 262 F.3d at 1297.

mentioned in the statutory language. Moreover, although the court had repeatedly held that no factor is essential or dispositive, even in the position-oriented approach,[22] the *Crowley* court held that vigor and hazard must be considered. App. A at 17a.

Petitioner's claim is representative of nearly two hundred cases pending before the United States Court of Federal Claims. Review by this Court is necessary to establish a coherent framework for analyzing these cases. The court below has vacillated so much in its analyses over the past years that federal employees serving at the same post and in the same job have been accorded different law enforcement officer status.[23] Indeed, some employees who obtained credit were later denied credit while serving in the same job.[24] The statutory and regulatory framework is far from complex. Review by this Court is necessary to put an end to the Federal Circuit's peregrinations and to articulate a standard that is truly consistent with the statutory language and OPM's regulations.

2. Statutory construction begins with the language of the statute, and "where the statutory language provides a clear answer it ends there as well."[25] In its decisions in *Hannon*, *Bingaman*, *Watson*, *Hall*, and *Crowley*, the court below strayed from this fundamental precept of statutory construction and impermissibly engrafted new standards where Congress has expressly spoken. Review by this Court is necessary to corral the Federal Circuit's forays into judicial

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[22] *Koenig*, 315 F.3d at 1381.

[23] *Compare Bremby v. Dep't of Navy*, 81 M.S.P.R. 450 (1999) (granting LEO coverage) *with Watson v. Dep't of Navy*, 86 M.S.P.R. 318 (2000) (denying coverage).

[24] *See e.g., Bingaman*, 127 F.3d at 1434.

[25] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

legislation and halt its encroachment on Congress's exclusive domain.

The task before the court below in this case was to define the meaning of the term "law enforcement officer" as it appears in the statute. The starting point for this endeavor, and ending point, is the express language of the statute. Congress defined the term, and that definition necessarily "excludes any meaning that is not stated."[26] Thus, the court below erred in rejecting the trial court's plain language interpretation of the statute and instead entertaining such inquiries as whether Mr. Crowley's position required strenuous physical labor or whether he carried a gun. The critical, and indeed, sole criterion is whether petitioner's duties were "primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."

Were any further explication of the term necessary (and the court below never suggested that the statutory definition was ambiguous), then the best place to look for clarification would have been Congress's definition of "criminal investigator" as that term is used to define the subset of law enforcement officers who are entitled to availability pay, a similar pay enhancement Congress has provided for law enforcement officers. In meticulous detail, Congress laid out what it considered to be the specific characteristics of criminal investigators including, for example, the ability to "recognize, develop and present evidence . . . in various legal hearings and court proceedings;" and to "apply the full range of knowledge, skills and abilities necessary for cases which are complex and unfold over a long period of time."[27] Congress did not mention physical fitness standards, working on call for twenty-four hours a day, or degree of hazard. Yet

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[26] *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

[27] 5 U.S.C. § 5545a(a)(2).

these are the standards the court below chose to apply rather than those provided by Congress.

Similarly, the court below erred in reading the legislative history as supporting its conclusion that degrees of vigor and hazard are relevant.[28] In 1974, Congress rewrote the definition of law enforcement officer, repealing the requirement that "full consideration . . . be given to the degree of hazard" encountered by an employee.[29] Notwithstanding this repeal, the *Crowley* court, citing to *Hannon*, intimated that the legislative history supports a consideration of hazard.[30] In *Hannon*, the court concluded that "[n]othing in [the] history shows, or even suggests, that Congress intended to prohibit consideration of hazard in determining law enforcement officer status."[31] But a "change in language [must] be read, if possible, to have some effect,"[32] and thus the *Hannon* and *Crowley* court's facile attempt to write hazard back into the statute cannot be countenanced.

In any event, the legislative history the court relied upon provides no support for the court's conclusion. First, the court relied on legislative history of the 1986 enactment of an entire new retirement system (FERS) to discern congressional intent in the 1974 amendment of the Civil Service Retirement Act. But legislative history from a subsequent Congress cannot serve "to fix the meaning of language it did not even

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[28] App. A at 16a.

[29] Pub. L. No. 93-350, 88 Stat. 355 (1974).

[30] App. A at 16a.

[31] 234 F.3d at 680.

[32] *American National Red Cross v. S.G.*, 505 U.S. 247, 263 (1992). *See also Obremski v. Office of Personnel Management*, 669 F.2d at 26 n.31 (noting that the 1974 amendment "made clear" that degree of hazard was irrelevant and quoting floor debate to the effect that the enhanced retirement benefits were not intended "as a reward to an employee for his having performed hazardous duties.").

draft."[33] More fundamentally, however, the cited legislative history says nothing at all about hazard. Rather, the cited committee report explains only the expansion of the definition of law enforcement officer to include the requirement that the position entail rigorous duties.[34]

The court's incorporation of hazard and vigor into the definition of a law enforcement officer flouts congressional intent and conflicts with a prior decision of the D.C. Circuit. Review by this Court is necessary to assure that Congress's intent, and not some divination by the court below, controls the determination of which federal employees are properly characterized as law enforcement officers.

3. The court below not only failed to heed Congress's explicit language, but also erred in refusing to defer to the regulations of the agency Congress entrusted with administering the statutes at issue. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer;"[35] nevertheless, the *Crowley* court failed to give considerable weight to OPM's regulations. Review by this Court is necessary to ensure that the Federal Circuit accords proper respect to agency interpretations of statutes they are charged with administering.

Congress has expressly delegated the administration of the civil service pay and retirement statutes, including the authority to prescribe regulations thereunder, to the Office of Personnel Management.[36] OPM has prescribed such regu-

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[33] *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

[34] S.Rep. No. 96-166 at 41 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405, 1466.

[35] *United States v. Mead Corporation*, 121 S. Ct. 2164, 2171 (2001), *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

[36] *See e.g.* 5 U.S.C. §§ 8347(a), 8461(g).

lations; specifically, it has explained that the definition of law enforcement officer "does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States."[37]

Although OPM has been entrusted with administering these statutes, never in the quarter century since the 1974 amendments has OPM seen fit to promulgate anything resembling the factors that the court below has considered. Under *Chevron* and *Mead*, the court below was not at liberty to ignore OPM's construction of the statutes at issue and propound entirely new standards of its own. Because OPM's regulations defined the term law enforcement officer "in a reasonable way in light of the Legislature's design," that reading is entitled to "controlling weight."[38] Because the court below accorded *no* weight to OPM's regulations, review by this Court is necessary to protect OPM's role in administering the civil service retirement statutes.

4. In *Watson*, the Federal Circuit recognized the infirmity of the *Bingaman/Hannon* analysis and endorsed yet another complicated approach to this simple issue. The court in *Koenig* and *Crowley* purported to follow *Watson*'s approach. But *Watson* does not cure the problems the court below has been grappling with over the past decade. Rather, *Watson*, which itself is deeply flawed, only compounds the court's errors and confounds the resolution of law enforcement officer claims.

The *Watson* court purported to adopt an analysis that is "more faithful to the language of the statutes and the regu-

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[37] 5 C.F.R. §§ 831.902, 842.802.

[38] *Regents Hospital v. Shalala*, 522 U.S. 448, 457 (1998).

lations" than the *Bingaman/Hannon* approach.[39] Specifically, the court held that the proper analysis requires examining the reasons for the existence of the position in question, as opposed to the particular duties of the incumbent of that position. But in adopting this "position-oriented"approach, the court focused on only one of several pertinent parts of OPM's regulations[40] and made no inquiry whether this construction was consistent with the regulatory scheme as a whole. It is not.

Specifically, OPM's regulations provide that an employee may request credit for service and in doing so "must provide . . . all pertinent information *regarding duties performed*" including, for law enforcement officers, "a list of the provisions of the Federal criminal law the incumbent is responsible for enforcing and arrests made."[41] The regulations do not even mention, much less require, evidence of the reasons for the existence of the position.

Similarly, the *Watson* court listed as critical factors whether the position has a maximum entry age or a mandatory retirement age. But agencies are statutorily precluded from creating maximum entry ages for positions, except for those positions *they* designate as law enforcement officer positions.[42] And, if an agency designates a position as a law enforcement officer position, the employee occupying that position would not need to apply for law enforcement officer credit. Thus, this purportedly "probative" factor[43] would

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[39] 262 F.3d at 1297.

[40] *Id.* at 1298, *citing* 5 C.F.R. §§ 831.902 and 842.802 (defining primary duties for CSRS and FERS, respectively).

[41] 5 C.F.R. § 831.906(a) (emphasis added).

[42] *See* 5 U.S.C. § 3307 (allowing maximum entry ages for Park Police Officers, air traffic controllers, firefighters, nuclear materials couriers and law enforcement officers).

[43] *Watson*, 262 F.3d at 1303.

never be present in a challenge brought by an employee claiming that he is entitled to law enforcement officer status. Similarly, mandatory retirement is a *consequence* of serving in an LEO position, not an indicia of such a position.[44] Agencies have no authority to impose mandatory retirement requirements for their positions; rather, their only authority in this regard is to designate positions as law enforcement officer positions.[45]

Watson thus hinges entitlement to law enforcement officer status on factors that can only exist if the agency has determined that the position is entitled to LEO coverage. But OPM's regulations explicitly provide that employees may seek coverage even if their employing agencies have not designated their positions as law enforcement officer positions.[46] Thus, far from being "more faithful" to OPM's regulations, *Watson*, like *Bingaman* and *Hannon*, flouts those regulations.

In both *Watson* and *Crowley*, the court below has hopelessly muddled the analysis for determining whether a federal employee is entitled to law enforcement officer credit for his work. Congress's simple statutory language and OPM's equally plain implementing regulations have been mangled by into a mishmash of conflicting extra-statutory standards. Review by this Court is necessary to end this era of uncertainty and vacillation and provide the hundreds of federal

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[44] *See* 5 U.S.C. § 8335 ("a law enforcement officer . . . shall be separated from service . . . [at] 57 years of age"); 5 U.S.C. § 8425 (identical provision for FERS).

[45] 5 C.F.R §§ 831.903(a), 842.803(a).

[46] *See e.g.* 5 C.F.R. § 831.906 (captioned "Requests from individuals" and providing a mechanism for employees to seek coverage); 5 C.F.R. § 831.907(b) (providing a mechanism for collecting retirement contributions "including cases in which it is finally determined that past service of a current or former employee" was subject to the higher contribution rates for law enforcement officers).

employees with pending claims for law enforcement retirement credit with a workable standard that is consistent with Congress's plain language and OPM's equally clear implementing regulations.

5. The court applied the wrong standard of review of the trial court's finding that Mr. Crowley was a law enforcement officer pursuant to 5 U.S.C. § 8331(20). The court's own precedents require that it review the "ultimate determination whether a particular employee is a law enforcement officer . . . under an arbitrary and capricious standard."[47] The court has repeatedly held that the fact-finding tribunal makes the determination of LEO status and that deference will be given to the fact finder's weighing of the factors.[48]

In *Hannon*, for example, the Court did not undertake its own determination or draw its own inferences of the facts in the case.[49] So, too, in *Koenig*, in which the court applied a position-based approach, the court affirmed that "the evaluation of and weight to be given to . . . [the] evidence in the record are judgment calls that rest primarily within the discretion of the [fact finder]."[50]

The trial court carefully considered and weighed all the factors identified by the court in *Watson* and *Hannon*. *See* App. E at 140a-151a. For example, the trial judge concluded,

> [c]onsistent with the statutory and regulatory definition of a "law enforcement officer," the court finds that the factor regarding whether the employee pursued or detained criminals is the most important factor for evaluating eligibility for [LEO] credit. Second, the factors

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[47] *Hannon*, 234 F.3d at 681.

[48] *See id.*; *Koenig*, 315 F.3d at 1381; *Hall*, 264 F.3d at 1060; *Gallagher v. Dep't of Treasury*, 274 F.3d 1331.

[49] *See Hannon*, 234 F.3d at 681.

[50] 315 F.3d at 1381.

> related to whether the job is physically demanding, and whether the officer is exposed to danger are also highly relevant to the analysis of eligibility for [LEO] credit. In the court's opinion, the second and third *Watson* factors regarding age limits should be given less weight than the other *Watson* factors.

App E at 140a.

The court below, however, rejected the trial court's weighing of the factors. The court offered no explanation why it superceded the findings of the trial court, and notably, did not find that the trial court's conclusions were either arbitrary or capricious or clear error. Far from deferring to the finder of fact, the panel freely revisited every finding and "judgment call" and substituted its own findings and conclusions. In so doing, the court plainly erred. This Court must exercise its supervisory authority to proscribe this double standard of review, extraordinarily deferential on employee appeals, but *de novo* upon the government's.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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July 26, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-5034

JOHN D. CROWLEY,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

Cathy A. Harris, Kator, Parks & Weiser, P.L.L.C., of Washington, DC, argued for plaintiff-appellee. With her on the brief were *Irving Kator* and *Michael J. Kator.*

Scott D. Austin, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were *Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, and *James M. Kinsella*, Deputy Director. Of counsel on the brief was *James E. Hicks*, Office of Chief Counsel, Drug Enforcement Administration, of Washington, DC.

Appealed from: United States Court of Federal Claims

Judge Marian Blank Horn

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5034

JOHN D. CROWLEY,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

DECIDED: February 17, 2005

Before CLEVENGER, DYK, and PROST, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* PROST. Concurring opinion filed by *Circuit Judge* DYK.

PROST, *Circuit Judge.*

The United States appeals the United States Court of Federal Claims' assertion of jurisdiction in this case, its grant of law enforcement officer ("LEO") status to the appellee, John D. Crowley, its holding that the appellee was not required to exhaust his administrative remedies, and its legal conclusion that the appellee is entitled to supplemental pay and prejudgment interest stemming from his claim under the Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101-509, §§ 401-412, 104 Stat. 1389, 1465-69 ("FLEPRA").[1] We

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[1] Sections 401-407 and 412 of FLEPRA are found, as amended, at 5 U.S.C. § 5305 note (2000) (§ 407 repealed by Pub. L. No. 108-411, § 101(d) (2004)). Section 408 is codified at 5 U.S.C. §§ 4521-4523, 5541 note; § 409 at 5 U.S.C.§ 8335 and 5 U.S.C. § 8425; § 410 at 5 U.S.C.

affirm the Court of Federal Claims' assertion of jurisdiction in this case. We reverse its holding regarding Mr. Crowley's LEO status and decline to reach the issues of exhaustion and pre-judgment interest.

BACKGROUND

The FLEPRA promises law enforcement officers supplemental pay over and above their standard pay if they work in certain metropolitan areas. 5 U.S.C. § 5305 note (2000). The statutory definition of "law enforcement officer" that the FLEPRA relies on is included in the retirement statutes dealing with LEOs in the Civil Service Reform Act of 1978 ("CSRA").[2] By the terms of the FLEPRA, a federal employee must satisfy the statutory definition of a "law enforcement officer" found in 5 U.S.C. § 8331(20) to qualify for the pay supplement. *See* 5 U.S.C. § 5541(3)(A) (2000). To meet the statutory definition of a LEO found in § 8331(20), a federal employee must either work in a primary law enforcement position (i.e. dedicated "primarily [to] the investigation, apprehension, or detention of individuals suspected or convicted of [criminal] offenses") or have been transferred from a primary law enforcement position into a supervisory or administrative position. 5 U.S.C. § 8331(20) (2000). An employee can meet the definition of a LEO by either serving in an approved LEO position or by applying to the employing agency for LEO credit based on the circumstances of his or her service. 5 C.F.R. §§ 831.903, 831.906 (2004).

The Merit Systems Protection Board ("the Board") undisputedly has jurisdiction over claims for LEO retirement credit

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5542, 5547 (repealed in part by Pub. L. No. 102-378, § 2(43), 106 Stat. 1346, 1352 (1992)); and § 411 at 5 U.S.C. § 5541.

[2] The relevant retirement statutes for LEOs provide for retirement benefits in the form of annuity payments for federal LEOs who have reached the age of fifty and have completed twenty years of service as a LEO. *See* 5 U.S.C. § 8336(c) (2000).

under the CSRA. *See United States v. Fausto*, 484 U.S. 439 (1988). In contrast to the CSRA, the FLEPRA is a separate money-mandating statute that requires the payment of supplemental pay to federal employees who satisfy both the criteria for supplemental pay and the statutory definition of "law enforcement officer."

The Drug Enforcement Agency ("DEA") employs diversion investigators ("DIs") (formerly known as compliance investigators) to investigate the diversion of legal but controlled substances from legitimate channels of commerce to illegitimate ones. DIs work to determine compliance with the Controlled Substance Act ("CSA") and may also take part in investigations of criminal activity. DIs investigate manufacturers and distributors of controlled substances in order to assure compliance with the CSA and that no improper diversion of controlled substances has occurred. And even though DIs may participate in criminal investigations, they may not carry firearms. DEA memos (hereinafter referred to as the "Miller-Mullen Memoranda") further established that DIs were not to participate in undercover activities of any kind, execute arrest or search warrants, direct or pay informants, or conduct moving surveillance. Furthermore, at the time Mr. Crowley served as a DI, DIs had no physical fitness requirements, age requirements, or agency-imposed obligations to be on call twenty four hours a day.[3]

The appellee in this case began his career in the DEA as a DI serving in the Boston Metropolitan area. His career as a DI lasted from March 12, 1973 to June 15, 1986. On June 16, 1986, he began work as a Group Supervisor in the Boston regional office of the DEA. He remained in that position until

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[3] This court has already had an opportunity to pass on the LEO status of DIs in a previous case. *See Hannon v. Dep't of Justice*, 234 F.3d 674, 675-76 (Fed. Cir. 2000) ("*Hannon II*"). Though the analysis in *Hannon II* is not entirely applicable to the instant case for reasons that shall become clear later in this opinion, it has some relevance to our analysis.

February 25, 1991, when he was transferred to DEA headquarters in Arlington, Virginia. There, he took the position of staff coordinator for the Office of Diversion Control. On October 31, 1994, Mr. Crowley was transferred back to the DEA's Boston Office, where he resumed his duties as Group Supervisor. In April 2001, he was made Special Assistant to the Diversion Program Manager and stayed in that position until his retirement on October 1, 2001.

The appellee sought and received retirement credit for primary LEO service from the Office of Personnel Management ("OPM"), arguing that his service as a DI qualified as primary LEO service. He also successfully sought LEO service credit for the period between June 16, 1986 and September 30, 1991, covering all of his initial service as Group Supervisor in Boston and part of his service as staff coordinator for the Office of Diversion Control in Arlington.[4] He argued before the OPM that his secondary service qualified him for FLEPRA pay because he was transferred directly to those secondary LEO positions from a primary LEO position.[5] In 1992, after receiving LEO credit for the period between March 12, 1973 and September 30, 1991, Mr. Crowley began to apply annually to the OPM for LEO retirement coverage for his supervisory and administrative work. He applied in 1992 for LEO status for the work he performed in fiscal year

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[4] Before the Court of Federal Claims, the appellee argued that the government was judicially and/or collaterally estopped from arguing that he was not entitled to primary LEO credit as a result of OPM's initial determination that he was indeed entitled to such credit. That argument was rejected by the court and has not been raised here.

[5] In order to qualify for supplemental pay under the FLEPRA, Mr. Crowley must show that he served in a primary LEO position and was properly transferred from that position to a valid secondary (administrative or supervisory) LEO position. If Mr. Crowley cannot prove either that he served in a primary LEO position or that his secondary positions were valid LEO positions, he does not qualify for supplemental pay under the FLEPRA.

("FY") 1992. In 1993, he did the same for FY 1993. The OPM acted on neither request. On December 7, 1993, the Department of Justice ("DOJ"), pursuant to the OPM's delegation of its authority to determine the LEO status of DEA employees, took responsibility for deciding Mr. Crowley's LEO status. *See* 58 Fed. Reg. 64,366 (Dec. 7, 1993).

After 1993, the appellee annually applied to the DOJ to expand his LEO credit for each subsequent year he served in a supervisory or administrative position. In August of 1994, the DOJ informed him that his staff coordinator position counted as a secondary position for which primary law enforcement experience was required. Thus, he was conferred LEO status for his service as staff coordinator to the Office of Diversion Control. In 1999, the DOJ reversed course, declared the appellee's staff coordinator position to be a position that did not qualify for LEO credit, and denied his requests for LEO retirement credit for his service between October 1, 1991 and June 15, 1997. That same year, Mr. Crowley applied one last time to the DOJ for LEO credit for the period covering June 16, 1997 to June 16, 1998. The DOJ has never acted on that request.

In response to the DOJ's denial of his requests for LEO status, the appellee filed a complaint with the Board for LEO retirement credit and, concurrently, a complaint in the Court of Federal Claims to recover supplemental pay under the FLEPRA for the period covering October 1, 1991 to October 1, 2001. Before the Board could take up his retirement claims, it stayed Mr. Crowley's action for retirement credit in order to allow him to pursue his FLEPRA claim before the Court of Federal Claims. With the Board's stay in place, the Court of Federal Claims proceeded to consider and decide the appellee's FLEPRA claim.

In a series of rulings dealing with the LEO status of DIs in general and of this appellee in particular, the Court of Federal Claims determined that: (1) it had jurisdiction to hear a DI's

FLEPRA claims; (2) the appellee was entitled to LEO status both for his service as a DI and also for his service in secondary drug enforcement positions within the DEA; (3) the appellee was not required to exhaust his administrative remedies since the DOJ had already determined its position regarding his LEO status; and (4) the Back Pay Act provided the waiver of sovereign immunity that would permit the appellee to recover pre-judgment interest from the federal government for his FLEPRA claims. *See generally Hannon v. United States*, 48 Fed. Cl. 15 (2000) ("*Hannon I*"); *Crowley v. United States*, 53 Fed. Cl. 737 (2002) ("*Crowley I*"); *Crowley v. United States*, 56 Fed. Cl. 291 (2003) ("*Crowley II*"); *Crowley v. United States*, 57 Fed. Cl. 376 (2003) ("*Crowley III*").

In determining that the appellee is entitled to LEO status, the Court of Federal Claims undertook a de novo interpretation of 5 U.S.C. § 8331(20), stating that "the simple words of the statute offer sufficient and clear guidance." *Crowley I*, 53 Fed. Cl. at 777. Under its interpretation of the plain meaning of the statute, the Court of Federal Claims determined that the appellee's service as a DI was covered by the statutory definition of "law enforcement officer." *Id.* at 768-74. As an alternative basis, the Court of Federal Claims examined Mr. Crowley's experiences as a DI in light of this court's precedential rulings in *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997); *Hannon II*, 234 F.3d 674; *Watson v. Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001); and *Hall v. Department of the Treasury*, 264 F.3d 1050 (Fed. Cir. 2001). Using the six factors identified in *Bingaman*, the Court of Federal Claims determined that, in light of his personal experiences as a DI in the DEA, the appellee merited being granted primary LEO status under 5 U.S.C. § 8331(20). The appellee thus satisfied the necessary prerequisites for the award of FLEPRA supplemental pay for his service in DEA supervisory or administrative positions. *Crowley I*, 53 Fed. Cl. at 774-88.

The United States now raises four issues on appeal from the Court of Federal Claims: (1) whether the Court of Federal Claims had jurisdiction to determine Mr. Crowley's LEO status; (2) whether Mr. Crowley properly qualified as a LEO under our precedent; (3) whether Mr. Crowley was required to exhaust his administrative remedies before asserting his claim in the Court of Federal Claims; and (4) whether the federal government had clearly and unambiguously waived its sovereign immunity on pre-judgment interest for awards granted under the FLEPRA. We have jurisdiction to hear this appeal under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims' conclusions of law de novo and all of its findings of fact for clear error. *Heisig v. United States*, 719 F.2d 1153, 1157-58 (Fed. Cir. 1983). Legal analysis involving the application of law to the facts is a legal question that is reviewed de novo. *See Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 164 (Fed.Cir. 1985) (requiring reversal "if the court engaged in a faulty analysis in applying the law to the facts and a correct application of the law to those facts might bring a different result").

A. The Jurisdiction of the Court of Federal Claims

As previously stated, the Tucker Act confers jurisdiction on the Court of Federal Claims. 28 U.S.C. § 1491(a)(1) (2000). But the Tucker Act alone does not create a substantive claim against the federal government for money damages. *See Martinez v. United States*, 333 F.3d 1295, 1302-03 (Fed. Cir. 2003) ("The actions for which the Tucker Act waives sovereign immunity are . . . actions brought pursuant to money-mandating constitutional provisions, statutes, regulations and executive orders. The Tucker Act does not itself provide the substantive cause of action." (internal citations omitted)).

No party in this litigation disputes that the FLEPRA is a money-mandating statute. Indeed, the FLEPRA is very ex-

plicit as to what is to be paid LEOs. As § 404 of the FLEPRA states,

> [E]ach law enforcement officer whose post of duty is in one of the [enumerated metropolitan areas] shall receive an adjustment [in their pay], which shall be a percentage of the officer's rate of basic pay . . . .

5 U.S.C. § 5305 note. The statute is clear—if a LEO works in a statutorily defined metropolitan area, that LEO is entitled to a pay adjustment depending on the metropolitan area in which he or she worked. Thus, the FLEPRA is a money-mandating statute. The substantive cause of action in this case is the FLEPRA, but the grant of jurisdiction in the Court of Federal Claims is properly found in the Tucker Act. 28 U.S.C. § 1491(a)(3).

Notwithstanding obvious jurisdiction under the Tucker Act, the appellant in this case argues that because *United States v. Fausto*, 484 U.S. 439 (1988), gives the Board exclusive jurisdiction over retirement claims brought under the CSRA, and because the statutory definition of "law enforcement officer" is found in the retirement statutes and a successful showing of LEO status is an element of a 5 U.S.C. § 8336(c) claim for retirement benefits, only the Board (as opposed to the Court of Federal Claims) has jurisdiction to hear a case that turns on the determination of LEO status. This argument, while creative, is unpersuasive.

A positive determination of LEO status is a necessary element to successful recovery for both CSRA retirement claims brought before the Board and also for pay adjustment claims brought under the FLEPRA before the Court of Federal Claims. There can be no dispute that CSRA retirement claims must go before the Board and that FLEPRA cases must go before the Court of Federal Claims. And courts have jurisdiction over claims—not over elements of claims. Given that the Court of Federal Claims has jurisdiction over FLEPRA

claims via the Tucker Act, it also has jurisdiction to make the legal and factual determinations necessary to resolving those claims.

The government argues that the Court of Federal Claims' jurisdictional finding raises the possibility of contradiction and lack of uniformity in future LEO determinations because the Board will determine LEO status for retirement purposes and the Court of Federal Claims will determine LEO status for FLEPRA purposes. The mere potential for lack of uniformity does not change our jurisdictional analysis. Indeed, it is our task to state the law that must be applied both by the Board and the Court of Federal Claims. Clear guidance from this court can mitigate any risk of contradiction between the Board and the Court of Federal Claims.

Furthermore, as the Court of Federal Claims correctly pointed out in *Hannon I*, Congress merely incorporated the definition of LEO from the retirement statutes into the FLEPRA—in doing so, it did not also incorporate the review mechanisms associated with the retirement statutes. *Hannon I*, 48 Fed. Cl. at 23. Furthermore, because the Board's jurisdiction is limited, it cannot hear FLEPRA claims. Thus, if the government's position were correct, a claimant would first have to pursue a perhaps undesired retirement claim before the Board in order to be able to litigate his or her FLEPRA pay claim before the Court of Federal Claims. There is no language in the FLEPRA to support such an odd result. And we do not construe statutes in ways that lead to such a result if we can avoid doing so. *See, e.g., In re Chapman*, 166 U.S. 661, 667 (1897) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.").

Accordingly, insofar as the question of the jurisdiction of the Court of Federal Claims to make LEO determinations in

deciding FLEPRA claims is concerned, we affirm the Court of Federal Claims' assertion of jurisdiction.

B. The Appellee's LEO Status

Our analysis of the appellee's request for LEO status is governed by our relevant precedent. That precedent is binding on this court as it is binding on the Court of Federal Claims. In its opinion, the Court of Federal Claims chose to begin by undertaking the interpretation of 5 U.S.C. § 8331(20) de novo and, in the alternative, analyzing this case under our precedent. We reject the court's initial de novo interpretation of § 8331(20) because the Court of Federal Claims may not deviate from the precedent of the United States Court of Appeals for the Federal Circuit any more than the Federal Circuit can deviate from the precedent of the United States Supreme Court. Trial courts are not free to make the law anew simply because they disagree with the precedential and authoritative analysis of a reviewing appellate court.

A LEO, under the statutory definition, is one who primarily "investigat[es], apprehen[ds] or det[ains]" those suspected of federal crimes. 5 U.S.C. § 8331(20). His or her primary duties are those that:

i Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

ii Occupy a substantial portion of the individual's working time over a typical work cycle; and

iii Are assigned on a regular and recurring basis.

5 C.F.R. §§ 831.902, 842.802 (2004). Generally, an employee who spends at least half of his or her working time on the investigation, apprehension or detention of criminal suspects is considered to be one whose duties are primarily law enforcement. *Id.*

Our current precedent regarding the LEO status of federal employees has evolved from a case-by-case factor specific framework to a position-oriented framework supplemented by the individual facts presented by each case.

1. The case-by-case framework

The case-by-case framework was first articulated by the Board in *Hobbs v. Office of Personnel Management*, 58 M.S.P.R. 628 (1993), and later adopted by this court in *Bingaman. Bingaman*, 127 F.3d at 1436. This framework relied on articulated factors and an individual employee's actual work experience to determine whether or not a federal employee was a LEO. These factors were to be considered as a whole and weighed by the Board on a case-by-case basis.

In *Hobbs*, the Board relied on the legislative history behind 5 U.S.C. § 8331(20) to establish a series of factors that would help in determining an employee's LEO status. Accordingly, the Board construed the term "investigation" in § 8331(20) to mean "criminal investigation" or, specifically, the "investigation of suspected or known criminals for the immediate purpose of criminally prosecuting them if warranted." *Hobbs*, 58 M.S.P.R. at 633. The Board went on to identify hazard and physical stamina requirements as integral to a LEO determination. In deciding the case, the Board relied on six factors to determine that Hobbs's position as a special inspector for the Bureau of Alcohol, Tobacco and Firearms was not a law enforcement position for the purposes of § 8331(20). Those factors were: 1) contact with suspected or known criminals; 2) authorization to carry a weapon and requirement to maintain proficiency in using a weapon; 3) giving Miranda warnings to witnesses interviewed in the course of investigation; 4) requirement to be on call twenty four hours a day; 5) working overtime frequently; and 6) requirement to maintain a level of physical fitness. *See Hobbs*, 58 M.S.P.R. at 633 n.5.

Four years after *Hobbs*, we adopted the *Hobbs* factors for ourselves in *Bingaman. Bingaman*, 127 F.3d at 1436. There,

we affirmed the Board's denial of LEO status based on an analysis of the facts performed under the rubric of *Hobbs*. In *Bingaman*, we specifically adopted the six Hobbs factors and explained, "while the scope of the statutory category of 'law enforcement officer' cannot be crisply defined with a single phrase, the set of factors the Board has developed [in *Hobbs* and afterward] captures the essence of what Congress intended." *Id.*

In December of 2000, we applied the *Hobbs-Bingaman* factors to a case involving a DI's request for LEO retirement credit. *See generally Hannon II*, 234 F.3d at 674. In that case, which was similar to this one on the facts and which will be discussed more thoroughly below, we affirmed the Board's determination that a DI who failed to meet four of the six *Hobbs-Bingaman* factors was not a LEO under § 8331(20). *Id.* at 677-82.

Finally, in *Hall*, we affirmed the Board's denial of LEO retirement credit to a Canine Enforcement Officer of the Customs Service. *Hall* described the *Hobbs-Bingaman* factors as being "a set of tools to assist the Board in gauging whether an employee's assigned activities properly fall within the scope of the law enforcement duties recognized by and contained within the statutory ambit" of the retirement statutes dealing with LEOs. *Hall*, 264 F.3d at 1056. Thus, in our view, the factors "were not set forth as a substitute for the statute, but rather as a framework for the factual inquiry needed to ascertain coverage under the statutory scheme." *Id.*

2. The position-oriented framework

Watson marked a further step in the evolution of the case-by-case framework first adopted in *Bingaman*.[6] There, we

[6] Though *Hall* issued at roughly the same time as *Watson* and did not explicitly adopt the position-oriented approach, our subsequent cases show that the *Watson* framework controls any LEO analysis done by this court. *See generally Koenig v. Dep't of the Navy*, 315 F.3d 1378 (Fed. Cir. 2003).

adopted the Board's new position-oriented approach, which "more affirmatively considered the reasons for the creation and existence of positions than . . . the officers' actual, even if incidental or occasional, duties." *Watson*, 262 F.3d at 1295. The actual duties carried out by federal employees would be relevant only if they run counter to the reasons for the existence of their positions. *Id.* at 1300-01.

In addition to adopting the position-oriented approach, the court identified the five "most probative" factors in determining a federal officer's entitlement to LEO status. Those five factors are:

> 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals; 2) whether there is an early mandatory retirement age; 3) whether there is a youthful maximum entry age; 4) whether the job is physically demanding so as to require a youthful workforce; and 5) whether the officer is exposed to hazard or danger.

Id. at 1303. In addition, the *Hobbs-Bingaman* factors "may be considered as necessary and appropriate." *Id.* The court explained this shift as being necessary to better capture whether or not the hazard associated with a position's duties and the physically demanding nature of the work were associated with law enforcement duties. *Id.* at 1302. Two years after *Watson*, we followed the position-oriented approach established in *Watson* in *Koenig v. Department of the Navy*, 315 F.3d 1378 (Fed. Cir. 2003). Indeed, *Koenig* used *Watson*'s position-oriented analysis to deny LEO status to the police officer appellant in that case.

It is clear from *Koenig* that the *Watson* position-oriented approach is the operative test for this court's review of a

federal employee's LEO status.[7] As the Board noted, such an approach is more in keeping with the original language of the relevant statutes than an analysis of an employee's actual duties. *See Watson v. Dep't of the Navy*, 86 M.S.P.R. 318, 320-21 (2000) (construing 5 U.S.C. § 8331(20) ("'[L]aw enforcement officer' means an employee, *the duties of whose position* are primarily the investigation, apprehension or detention of individuals suspected or convicted of [criminal] offenses.") (emphasis added)).

3. Relevant considerations in the position-oriented framework

In applying the position-oriented approach, we consider the relevant factors established by *Bingaman* and *Watson* in determining whether or not a position, not an employee, is entitled to LEO status. And, as in *Watson*, evidence of an individual employee's activities will be considered insofar as it substantially conflicts with our position determination.

As previously noted, our cases offer an array of factors to be considered in applying the position-oriented approach to our review of LEO determinations. Both *Watson* and *Hall* used different factor-based tests to aid their review of LEO determinations. Prior to *Watson*, the *Hobbs-Bingaman* factors were predominant in this court's review of LEO determinations. While *Watson* identified five factors that it held to be of primary importance, it did not do away with the *Hobbs-Bingaman* factors. It instead allowed those factors to be

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[7] We decline the government's invitation to decide this case by using *Hannon II* as decisive precedent. *Hannon II* was decided prior to the adoption of the position-oriented approach. The entire analysis in *Hannon II* was conducted using the *Hobbs-Bingaman* factors. We cannot now graft a position-oriented analysis onto *Hannon II* where none previously existed. We will, however, use *Hannon II* in evaluating whether Mr. Crowley's actual duties satisfy the factors relevant to determining whether or not his actual experience contradicted the reasons for his position's existence.

considered "as necessary and appropriate" in addition to its five enumerated factors. *Watson*, 262 F.3d at 1303.

In reviewing the rationale behind the *Watson* factors, the *Hobbs-Bingaman* factors and this court's opinions in *Bingaman*, *Hannon II*, *Hall*, *Watson* and *Koenig*, two factors predominate over all others. Indeed, it could be said that certain identified factors are really proxies for the two main considerations behind our LEO cases.

The most important consideration in our position-oriented approach of LEO determinations is the physical vigorousness required by the position in question. As we noted in *Bingaman*, the legislative history behind § 8331(20) emphasized that LEO positions "should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the federal service." *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 93-948, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3698, 3699). In *Hannon II*, *Watson*, and *Hall*, we likewise pointed out that physical vigorousness was a factor of utmost importance in determining LEO status. *Hannon II*, 234 F.3d at 677-78; *Watson*, 262 F.3d at 1302; *Hall*, 264 F.3d at 1058 ("We agree with the Board's analysis in *Hobbs* that the relevance of hazard to a LEO analysis is that physical stamina and vigor are necessary to overcome such hazards.").

The preeminence of a position's physical vigorousness in determining whether or not a federal position qualifies for LEO status is further supported by the legislative history behind § 8331(20). *See* S. Rep. No. 93-948, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3698, 3699; *see also* 5 U.S.C. § 8401(17)(A)(ii) (2000) (referring to the definition of "law enforcement officer" in the Federal Employees Retirement System as being an employee whose duties "are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals"); S. Rep. No. 99-

166, at 41 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405, 1446 (asserting that, for the purposes of the Federal Employees Retirement System, a law enforcement officer was intended to be "an employee with rigorous law enforcement duties that require young and vigorous individuals"). Thus, as evidenced by the relevant legislative history and our precedents, physical vigorousness is the *sine qua non* of LEO status determinations. Absent a showing of a position's requirement of physical vigorousness, an employee cannot successfully show LEO status.

All of the factor-based tests have attempted to devise factors that could help in determining the physical vigorousness required by a position. For example, in the *Hobbs-Bingaman* framework, we considered whether or not an employee worked for long periods without a break, was on call twenty four hours a day and/or was required to maintain a level of physical fitness. *Bingaman*, 127 F.3d at 1436. Similarly, in *Watson*, we inquired as to whether a position had an early mandatory retirement age, a youthful maximum entry age, and physical demands so great as to require a youthful workforce. *Watson*, 262 F.3d at 1303. These factors, pulled from our precedents, are the exclusive factors that a court should consider in determining whether a position is sufficiently vigorous to qualify for LEO status.

But physical vigorousness is only the first of two inquiries. As a secondary consideration, this court has also examined the hazardousness of a position in LEO determinations. Hazard, while important, is secondary to physical vigorousness because the legislative history emphasizes physical vigor to a greater extent and also because *Hall* instructs us to use hazard as a secondary indication of physical vigorousness. *See Hall*, 264 F.3d at 1058. Language in *Bingaman*, *Hannon II* and *Watson* stresses hazardousness as a major factor independent of vigorousness. Given our precedent, it is clear to us that physical vigorousness and hazardousness are the major fac-

tors to be considered in determining a federal employee's LEO status.

In *Bingaman*, we inquired as to whether an employee was authorized to carry a firearm, had frequent contact with criminal suspects and/or interrogated witnesses and suspects (giving Miranda warnings where appropriate). *Bingaman*, 127 F.3d at 1436. In *Watson*, we asked whether a position exposed an employee to hazard or danger and whether a position required employees to guard life or property instead of more frequently pursuing or detaining criminals (with guarding life or property as not being LEO activity). *Watson*, 262 F.3d at 1303. These factors attempted to get to the essence of whether or not a position was hazardous enough to be considered a LEO position. (Indeed, the fifth *Watson* factor was explicit in identifying hazardousness as an important factor.) These factors, previously enumerated by this court, are the exclusive factors to be considered in determining a position's hazardousness.

Thus, we hold that there are two major factors that should be considered in determining whether a position should be conferred LEO status. First, and predominant, is the physical vigorousness required by the position. The relevant considerations in any vigorousness determination are whether or not the position brings with it (in order of importance): 1) strenuous physical fitness requirements; 2) age requirements (such as a mandatory retirement age or a maximum entry age); or 3) a requirement that an employee be on call twenty four hours a day.[8] These sub-factors should be evaluated by the Board or the Court of Federal Claims, who must apply the facts to the law to determine which sub-factors, if any, have been satisfied.[9] Once that is complete, the court will have the

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[8] Satisfaction of only the twenty four hour on-call requirement will not satisfy the physical vigorousness factor.

[9] For ongoing sub-factors (such as twenty four hour on-call require-

discretion to weigh the sub-factors in making a vigorousness determination.[10] If the court finds that the position in question did not require vigorousness as herein defined, the LEO inquiry is at its end and the position in question must be deemed to be outside of the scope of 5 U.S.C. § 8331(20).[11] If the position is found to be vigorous, then the second major factor necessary to establish LEO status—hazardousness—must be considered.

To determine hazardousness, a court should consider whether the position (in order of importance): requires frequent and consistent contact with criminal suspects on the part of the employee (including interrogation of suspects and pursuit or detention of criminals); or authorizes the employee to carry a firearm.[12] As in *Watson*, the hazardousness sub-factors are to be considered under the position-oriented approach. Again, this determination of hazardousness will be at the discretion of the court.[13]

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ments) to be satisfied, the position in question must, consistent with regulation, require those factors at least fifty percent of the time.

[10] In our discussion we use the word "court" to mean either the Court of Federal Claims or the Merit Systems Protection Board, whichever is appropriate to the facts of the case.

[11] In actions before the Board, the burden of proof is on the employee to show that his or her position is entitled to LEO status based on a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2) (2004). Before the Court of Federal Claims, a plaintiff attempting to qualify for LEO status also bears the burden of proof. 5 C.F.R. § 831.906(a). A plaintiff in the Court of Federal Claims must also show that his or her position is entitled to LEO status by a preponderance of the evidence.

[12] Satisfaction of the firearm requirement alone will not satisfy the hazardousness factor. There must be some showing of a requirement of frequent and consistent contact with criminals or suspects in order for the hazardousness prong of our inquiry to be met.

[13] This position-oriented evaluation will be carried out as the analysis in our *Watson* decision was carried out, with careful examination of the official documentation surrounding the position's existence.

When a court determines that a position fails to qualify for LEO status, the court must afford the employee the opportunity to show that, notwithstanding the absence of a described LEO position, the employee in fact does qualify for LEO credit. This opportunity is necessary since it is possible that agencies will not always keep job descriptions current to match the actual activities of the individuals who occupy described positions. For example, an employee occupying a position that fails to satisfy the test for vigorousness or hazard may nonetheless by actual duties be required to satisfy both those tests. The possible conflict between a position based decision and a decision driven by the activities of a particular individual was foreseen by the Board in *Watson*: "evidence of actual duties performed . . . [must show] that—contrary to the official documentation of the position—'the basic reason for the existence of the position' was actually investigation, apprehension, or detention." *Watson*, 86 M.S.P.R. at 328. Therefore, the employee has the opportunity to disprove the conflict between the description of the position and the real-life facts of occupying the position. To establish LEO status in this fashion, the employee must, consistent with the regulation, show that fifty percent or more of his or her actual duties were LEO duties (i.e. duties that satisfy the vigorousness and hazardousness requirements for LEO status). A preponderance of the evidence must support the employee's claim.

4. Mr. Crowley's case

Applying our test to the facts of this case, we first determine whether Mr. Crowley served in a primary LEO position when he served as a DI for the DEA. If he did not, then our inquiry is at its end. If he did, then we must consider whether he properly transferred to a secondary LEO position.

We begin by using the factors identified above to determine the physical vigorousness required by Mr. Crowley's position as a DI within the DEA.

Throughout Mr. Crowley's DI service with the DEA, nothing in his position description or in any of the official documentation regarding his position articulated a physical fitness requirement. Indeed, DEA memoranda from 1988 and 1989 support that assertion. Furthermore, as the court itself noted, no physical fitness standards or requirements were ever adopted for DIs by the DEA. *Crowley I*, 53 Fed. Cl. at 780. The Court of Federal Claims found that Mr. Crowley's position was physically demanding because Mr. Crowley may have been asked to move heavy objects and inspect rooftops on occasion. *Crowley I*, 53 Fed. Cl. at 780. The court, however, failed to find that Mr. Crowley's *position* had any strenuous physical fitness requirement. Moreover, this type of incidental physical labor does not satisfy a physical fitness requirement as interpreted by this court. *See Hannon II*, 234 F.3d at 677.

The Court of Federal Claims also correctly noted that Mr. Crowley's position was not subject to any maximum entry level age requirement or any mandatory retirement age. *Id.* As a result, Mr. Crowley's position as a DI does not satisfy the age-related factors pertaining to vigorousness.

The final factor in our vigorousness analysis is whether or not Mr. Crowley was required to be on call twenty four hours a day. There was no official requirement that he be on call twenty four hours a day. The Court of Federal Claims points to anecdotal evidence where Mr. Crowley was called in to work irregular hours to support its finding that Mr. Crowley was on call twenty four hours a day. *Crowley I*, 53 Fed. Cl. at 779. It also pointed to testimony regarding the attitude of Mr. Crowley's superiors towards his general availability. *Id.* (quoting the Special Agent in Charge of the Portland, Maine DEA office as having testified that he "considered every DEA employee to be at my beck and call"). But anecdotal evidence and testimony regarding general availability is insufficient to show that Mr. Crowley was *required* by the obligations of his position to be on call twenty four hours a day. Accordingly,

under our position-oriented approach, we find that the final vigorousness factor has not been met in this case.

Ordinarily, under the position-oriented approach we articulate here, once a negative determination regarding vigorousness is made, a court need not delve into the hazardousness of an employee's position to determine LEO status. Even if we were to examine the hazardousness of Mr. Crowley's position, however, our result would be unchanged.

It is undisputed that Mr. Crowley's position did not authorize him to carry a firearm. Furthermore, there is no evidence that his position existed for the purpose of pursuing and detaining criminals. And even though the Court of Federal Claims correctly noted that there is some evidence that Mr. Crowley himself did engage in contact with and interrogation of those suspects, nothing in his position description mentions any requirements for contact with or interrogation of criminal suspects.[14] Indeed, the Miller-Mullen Memoranda specifically led DIs away from activity that would tend to lead to contact with criminals and suspects. In short, there is little in the official duties of a DI that would incline us to find the position to be hazardous in nature.

The result of our analysis conforms with our decision in *Hannon II*. There, we applied the case-by-case framework to determine that a DI did not qualify for LEO status. As in this case, the DI in *Hannon II* was not authorized to carry a gun, arrest suspects, execute search warrants, control informants or conduct moving surveillance. *Hannon II*, 234 F.3d at 675. Hannon was also not required to satisfy a physical fitness requirement or be on call twenty four hours a day. *Id.* at 677. Furthermore, even though there was anecdotal evidence that Hannon was present at the execution of several searches and

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[14] The criminal contacts related to Mr. Crowley's career and identified by the Court of Federal Claims are anecdotal at best. *Crowley I*, 53 Fed. Cl. at 779. They are, therefore, insufficient to show that Mr. Crowley's position required frequent and consistent criminal contact.

occasionally interviewed witnesses and criminal suspects over the course of his seven year career as a DI, we held that he nevertheless did not satisfy the *Hobbs-Bingaman* factors and, thus, failed to qualify for LEO status. *Id.* at 678. Although we cannot use *Hannon II* as controlling authority for our conclusion that DIs are not entitled to LEO status because it precedes the position-oriented framework established in *Watson*, it does confirm our contention that anecdotal evidence of criminal contact cannot in and of itself confer LEO status on a federal employee. And it provides further persuasive support for our conclusion that a DI is not entitled to LEO status under § 8331(20).

Accordingly, we find that Mr. Crowley's position does not qualify for LEO status under controlling precedent and statutes. Furthermore, on this record, it has not been established by a preponderance of the evidence that fifty percent or more of Mr. Crowley's actual duties were LEO duties. He therefore cannot show that his actual duties conflict with his job description to the extent required to gain LEO status. We thus reverse the Court of Federal Claims' finding that the appellee, Mr. Crowley, was entitled to LEO status under the FLEPRA.

C. Exhaustion and Pre-Judgment Interest

We do not reach the question of whether Mr. Crowley was required to exhaust his administrative remedies before bringing suit in the Court of Federal Claims or whether he was entitled to pre-judgment interest on any recovery stemming from his FLEPRA claim. Because we have determined that his position did not confer LEO status upon Mr. Crowley, reaching these issues is unnecessary.

CONCLUSION

For the reasons stated above, the Court of Federal Claims' assertion of jurisdiction over FLEPRA claims is affirmed. Its finding that the appellee is entitled to LEO status is reversed.

REVERSED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5034

JOHN D. CROWLEY,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

DYK, *Circuit Judge*, concurring.

I join the opinion of the court. I write separately to emphasize that our jurisdictional holding should not be read to require that the two proceedings in cases such as this—one in the Court of Federal Claims for supplemental pay and one before the Merit Systems Protection Board ("Board") for retirement pay—proceed simultaneously.

Both the Court of Federal Claims and the Board are authorized to stay their proceedings pending the outcome of litigation in the other forum, and a decision by one will be collateral estoppel as to the other. In my view, Congress designated the Board as the primary forum for the resolution of disputes concerning Law Enforcement Officer status entitlement, and the Board has had twenty-seven years of experience administering the statute. Where claims are filed both in the Court of Federal Claims and before the Board, the Court of Federal Claims should routinely stay its proceedings pending the outcome of Board proceedings, unless the Court of Federal Claims proceedings are at an advanced stage when the Board proceedings are commenced. *Cf. Martinez v. United States*, 333 F.3d 1295, 1310 (Fed. Cir. 2003) (en banc) (stays in parallel proceedings before the Court of Federal Claims and the Army Board for Correction of Military Records).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed April 27, 2005]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 4, 2005.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: April 27, 2005

cc: Scott D. Austin
Irving Kator

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

[Filed August 19, 2003]

No. 94-711C

JOHN CROWLEY,

Plaintiff,

v.

UNITED STATES,

Defendant.

OPINION

HORN, J.

On August 30, 2002, this court issued an opinion finding that John Crowley was entitled to Law Enforcement Officer (LEO) status and locality pay benefits under section 404 of the Federal Law Enforcement Pay Reform Act (FLEPRA) while serving in the Drug Enforcement Agency (DEA) from October 1, 1991 through April 1, 2001. *Crowley v. United States*, 53 Fed. Cl. 737, 792 (2002). Plaintiff now claims he is entitled to interest on the FLEPRA back pay damages awarded by the court, and cites the Back Pay Act, 5 U.S.C. § 5596(b) (2000), as a waiver of sovereign immunity allowing recovery of interest on his claim.

FINDINGS OF FACT

The court provided a detailed discussion of the facts in its earlier opinion, *Crowley v. United States*, 53 Fed. Cl. 737, which are incorporated herein. For a more detailed discussion of the facts, the parties are referred to the earlier opinion. In 1990, Congress established a retirement and pay benefit sys-

tem for federal law enforcement officers, making them eligible for enhanced pay and early retirement pursuant to the Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101-509, §§ 401-407, 104 Stat. 1389, 1465-69. The regulations that set forth the standards for qualifying as an LEO are found at 5 C.F.R. §§ 831.903-831.911 (2000) and identify two methods for claiming LEO credit: (1) by agency determination that a position qualifies for LEO credit, or (2) by filing a claim for LEO credit with the relevant agency personnel office, in this case, the Justice Management Division (JMD) of the Department of Justice. *See* 5 C.F.R. §§ 831.903(a), 831.904(a), 831.906(b). LEO status entitles the claimant to FLEPRA benefits, including premium pay for LEOs working in selected cities. *See* 5 U.S.C. § 5305 note (FLEPRA § 404).

After his claim for LEO credit was rejected by the JMD, Mr. Crowley along with 274 other Diversion Investigators whose actions were all consolidated originally under *Hannon v. United States*, Case No. 91-1334C, *et al.*, and now under *Colosimo v. United States*, Case No. 91-1334C, *et al.*, filed suit in this court seeking LEO credit and the associated FLEPRA benefits. Mr. Crowley sought benefits under sections 403 and 404, for his work with the DEA as a Diversion Investigator from October 1, 1991 through October 1, 2001. Plaintiff also requested overtime pay under 5 U.S.C. § 5542 (2000), Administratively Uncontrollable Overtime (AUO) pay, pursuant to 5 U.S.C. § 5545(c)(2) and availability pay under 5 U.S.C. § 5545(a). After a trial held in Boston, Massachusetts and Washington, D.C., this court denied plaintiff's claims for overtime pay, AUO, availability pay, and special pay rates under FLEPRA section 403. The court, however, found that plaintiff qualified for LEO credit from October 1, 1991 through April 1, 2001, which entitled him to premium pay under FLEPRA section 404. *See Crowley v. United States*, 53 Fed. Cl. at 792. In order to determine Mr. Crowley's qualifications for LEO credit, the court addressed four periods of plaintiff's employment that allegedly entitled him to such

credit. The court examined Mr. Crowley's role as a Diversion Investigator in Boston, Massachusetts from 1973 through 1986; as a Diversion Group Supervisor from 1986 through 1991; as a Staff Coordinator in the Office of Diversion at DEA headquarters in Arlington, Virginia from 1991 through 1994; and as a Diversion Group Supervisor in Boston, Massachusetts from 1994 through 2001. On April 18, 2003, this court denied defendant's motion for reconsideration of its August 30, 2002 decision.

Regarding the FLEPRA locality pay damages awarded to plaintiff in *Crowley v. United States*, 53 Fed. Cl. 737, plaintiff argues that "the damages awarded by the Court constitute back pay for the correction of an unjustified or unwarranted personnel action and, accordingly, he is entitled to interest on that award under the Back Pay Act, 5 U.S.C. § 5596(b)(2) (2000)." Defendant maintains that plaintiff is not entitled to interest under the Back Pay Act because the 1978 amendment to the Act "made clear that the Act does not apply to reclassification actions, such as the action brought by Mr. Crowley before this Court which formed the basis for his award of premium pay." (emphasis in original). In the alternative, defendant contends that Mr. Crowley has not been affected by an unjustified or unwarranted personnel action that resulted in the reduction or withdrawal of his pay, which, according to the defendant, is required for compensation under the Back Pay Act.

DISCUSSION

In the opinion issued in this case on August 30, 2002, this court found that plaintiff is entitled to FLEPRA section 404 benefits for positions held between January 1, 1992 and April 1, 2001. FLEPRA section 404(b)(1) states in relevant part:

> Except as provided in subsection (a), effective on the first day of the first applicable pay period beginning on or after January 1, 1992, each law enforcement officer

> whose post of duty is in one of the following areas shall receive an adjustment, which shall be a percentage of the officer's rate of basic pay, as follows:
>
> Boston-Lawrence-Salem, MA-NH Consolidated Metropolitan Statistical Area . . . 16%
>
> * * *
>
> Washington-Baltimore DC-MD-VA-WV Consolidated Metropolitan Statistical Area . . . 4%

5 U.S.C. § 5305 note. The court found that Mr. Crowley is entitled to locality pay under FLEPRA section 404 at a rate of four percent from the first applicable pay period following January 1, 1992 to October 30, 1994, while plaintiff worked in Arlington, Virginia, and at a rate of sixteen percent from October 31, 1994 to April 1, 2001, while he worked in Boston, Massachusetts. Here, this court addresses plaintiff's claim that, under the Back Pay Act, 5 U.S.C. § 5596(b), plaintiff also is entitled to interest on the back pay owed to him for FLEPRA locality pay during the above mentioned periods.

With regard to a claim for interest against the United States, the longstanding rule has been that the sovereign is not liable for interest on a damage award unless consent to pay has been made explicit by a waiver of sovereign immunity in an act of the legislature or in a lawful contract of its executive officers. *Library of Cong. v. Shaw*, 478 U.S. 310, 314-15, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986); *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49, 95 L. Ed. 738, 71 S. Ct. 552, 118 Ct. Cl. 653 (1951); *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 91 L. Ed. 577, 67 S. Ct. 601, 108 Ct. Cl. 763 (1947); *United States v. North Carolina*, 136 U.S. 211, 216, 34 L. Ed. 336, 10 S. Ct. 920 (1890); *United States v. Bayard*, 127 U.S. 251, 260, 32 L. Ed. 159, 8 S. Ct. 1156 (1888); *Tillson v. United States*, 100 U.S. (10 Otto) 43, 47, 25 L. Ed. 543, 15 Ct. Cl. 618 (1879); *see also*

United States v. N. Am. Transp. & Trading Co., 253 U.S. 330, 336, 64 L. Ed. 935, 40 S. Ct. 518, 55 Ct. Cl. 522 (1920); *Clary v. United States*, 333 F.3d 1345, 1351-52 (Fed. Cir. 2003); *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1381 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2214, 155 L. Ed. 2d 1105 (2003); *Hartog Foods Int'l v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002); *IBM v. United States*, 201 F.3d 1367, 1370 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1183, 148 L. Ed. 2d 1025, 121 S. Ct. 1167 (2001); *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed. Cir. 1986); *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826, 78 L. Ed. 2d 103, 104 S. Ct. 97 (1983). Courts must strictly construe waivers of sovereign immunity in favor of the government. *Lane v. Pena*, 518 U.S. 187, 192, 135 L. Ed. 2d 486, 116 S. Ct. 2092 (1996); *Library of Cong. v. Shaw*, 478 U.S. at 318; *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983); *McMahon v. United States*, 342 U.S. 25, 27, 96 L. Ed. 26, 72 S. Ct. 17 (1951) *reh'g denied*, 342 U.S. 899, 96 L. Ed. 673, 72 S. Ct. 228 (1951); *Hartog Foods Int'l v. United States*, 291 F.3d at 791. Moreover, "congressional consent must be unambiguous." *IBM v. United States*, 201 F.3d at 1370. As stated by the United States Supreme Court:

> Thus, there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

United States v. N.Y. Rayon Importing Co., 329 U.S. at 659 (citations omitted).

The Supreme Court succinctly summarized the historical background of the no-interest rule, requiring a separate waiver of sovereign immunity for interest, as follows:

> In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. This requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim. Because interest was generally presumed not to be within the contemplation of the parties, common-law courts in England allowed interest by way of damages only when founded upon agreement of the parties. In turn, the agreement-basis of interest was adopted by American courts. Gradually, in suits between private parties, the necessity of an agreement faded. The agreement requirement assumed special force when applied to claims for interest against the United States. As sovereign, the United States, in the absence of its consent, is immune from suit. This basic rule of sovereign immunity, in conjunction with the requirement of an agreement to pay interest, gave rise to the rule that interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress.

Library of Cong. v. Shaw, 478 U.S. at 314-15 (citations omitted).

Plaintiff alleges that the Back Pay Act, 5 U.S.C. § 5596, is a waiver of sovereign immunity that allows him to collect interest on his FLEPRA back pay damages. The Back Pay Act provides that interest on back pay is allowable to:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable

> law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee . . .

5 U.S.C. § 5596(b)(1); *see also* 5 U.S.C. § 5596(b)(2)(A). The Back Pay Act also states: "This subsection does not apply to any reclassification action . . . ." 5 U.S.C. § 5596(b)(3).

Defendant maintains that the Back Pay Act does not apply to plaintiff's FLEPRA claims, and that plaintiff has cited no statute sufficient to warrant a waiver of sovereign immunity for interest on Mr. Crowley's damage awards. Citing *United States v. Testan*, 424 U.S. 392, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976), defendant first argues that the Back Pay Act does not apply to plaintiff's FLEPRA back pay award because the claim is actually a "reclassification action." In *Testan*, the plaintiffs were government trial attorneys who sought reclassification as GS-14s and appropriate back pay under the Back Pay Act because their duties were identical to those of other trial attorneys who were classified at a higher grade. *United States v. Testan*, 424 U.S. at 393, 394. In finding that the plaintiffs were not entitled to compensation under the Back Pay Act, the Supreme Court stated: "The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it." *Id.* at 402. The Court also stated: "This statute [the Back Pay Act] . . . does not apply, in our view, to wrongful-classification claims." *Id.* at 405. Defendant asserts that plaintiff's claim in this case is "nearly identical" to the *Testan* claim because plaintiff in this case "was never appointed to a position that was classified as an LEO position." Therefore, according to defendant, plaintiff's claim for LEO credit and FLEPRA benefits is one for "reclassification" and does not fall under the Back Pay Act.

In the instant case, plaintiff did not seek reclassification to a higher grade, as did the plaintiffs in *Testan*, but only sought

the pay to which his duly appointed position entitled him. In his amended complaint, plaintiff asserted, "Defendant's failure to provide plaintiffs the compensation provided under the FLEPRA . . . violates the mandatory provisions of the FLEPRA." Thus, plaintiff sought this court's enforcement of his statutory right to premium pay benefits under FLEPRA for specific positions held at the DEA between 1991 and 2001. Mr. Crowley's claim is not properly described as one for "reclassification," and plaintiff is not precluded from recovery of interest on his damage award by the language in *United States v. Testan*.

As its second argument, defendant contends that the Back Pay Act does not apply to plaintiff's damage award because plaintiff has not been affected by an unwarranted personnel action that resulted in the reduction or withdrawal of his pay within the meaning of the Back Pay Act. *See* 5 U.S.C. § 5596(b)(1). The Back Pay Act allows federal agency employees who "have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction" of compensation to collect back pay with interest for the compensation to which they would have otherwise been entitled. *See* 5 U.S.C. § 5596(b)(1)-(b)(2)(A). In a 1978 amendment to the Back Pay Act, Congress codified the Testan rule prohibiting collection of back pay for reclassification actions and expanded the definition of "personnel action" to include "the omission or failure to take an action or confer a benefit." Pub. L. No. 95-454, P 702, codified at 5 U.S.C. § 5596(b)(4); S. Rep. 95-969, at 114. With the 1978 amendment, however, the Act was unclear as to whether the inclusion of the "failure . . . to confer a benefit" language was intended to broaden the range of actions compensable under the Act beyond "withdrawal or reduction" in compensation; or whether the Act allows recovery for personnel actions only when the employee has experienced actual "withdrawal or reduction" in pay, thereby overriding the language allowing compensation for "failure . . . to

confer a benefit." *See Brown v. Sec'y of Army*, 287 U.S. App. D.C. 8, 918 F.2d 214, 220 (D.C. 1990); *cert. denied sub nom. Brown v. Stone*, 502 U.S. 810, 116 L. Ed. 2d 33, 112 S. Ct. 57 (1991). Noting that "the amendment's clarification of the term 'personnel action' to include 'failure . . . to confer a benefit' left untouched the condition that the employee suffer a 'withdrawal' of or 'reduction' in compensation," Circuit Judge, now Supreme Court Justice Ginsburg resolved the question in *Brown v. Sec'y of Army* as follows:

> We comprehend the 1978 Back Pay Act definitional amendment to mean that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief. Only in the former case will the employee be treated as one already "duly appointed" to the higher position, so that the failure to confer the benefit constitutes a "withdrawal or reduction" in compensation.

Brown v. Sec'y of Army, 918 F.2d at 219-20. The United States Court of Appeals for the Federal Circuit earlier had interpreted personnel actions compensable under the Back Pay Act as follows:

> The 1978 amendment was not designed to provide payment for all actions which should or might well have been taken, but only for those payments or benefits which were required by law (a statute or regulation). The history of the change emphasizes this limited purpose. Previously, the Back Pay Act literally permitted recovery only when the employee incurred "a withdrawal or reduction" in pay, 5 U.S.C. § 5596 (b) (1976)—thus omitting in words to blanket failures to make additional payments that were mandated by law, *e.g.*, a statutory periodic increase or a benefit conferred by a non-discretionary administrative regulation. For some years, the General Accounting Office authorized such payment for

> non-discretionary benefits, and in 1977 the Civil Service Commission adopted regulations along the same line. The 1978 amendment to the Back Pay Act was specifically intended to incorporate that general administrative position into the Act—and no more.

Spagnola v. Stockman, 732 F.2d 908, 912 (Fed. Cir. 1984) (emphasis in original) (citations omitted). Thus, a determination of whether the Back Pay Act entitles Mr. Crowley to interest on his FLEPRA award turns on the nature of the award—whether or not the FLEPRA award is for a non-discretionary upgrade of the "virtually automatic, noncompetitive kind" that is "mandatory once specific conditions are met." *See Brown v. Sec'y of Army*, 918 F.2d at 220;[1] *Spagnola v. Stockman*, 732 F.2d at 912.

The plain language and legislative history of FLEPRA indicate that the nature of FLEPRA's benefits do not take the form of discretionary upgrades or reclassifications. Section 404 of FLEPRA, titled "Special pay adjustments for law enforcement officers in selected cities," states that "each law enforcement officer whose post of duty is in one of the following areas shall receive an adjustment . . . ." 5 U.S.C. § 5305 note (FLEPRA § 404(b)(1)). Further, a 1990 House Conference Report discussing FLEPRA states:

> The Conferees have included a separate Title in pay reform section of the Act which is intended to provide immediate relief to the Federal law enforcement agencies who are facing severe recruitment and retention

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[1] The Court of Appeals for the District of Columbia Circuit stated:

> In sum, the Back Pay Act, as currently framed, contains clauses tugging in opposite directions. We have adopted a reading that, if less than fully satisfying, is consistent with the Supreme Court's instruction that federal sovereign immunity waivers must be unambiguously expressed, and construed strictly in favor of the sovereign. See *Library of Congress v. Shaw*, 478 U.S. at 318 . . .

Brown v. Sec'y of Army, 918 F.2d at 221.

problems. These problems have been directly attributed to the large discrepancies which exist in the area of pay and benefits between the Federal law enforcement officers and their state and local enforcement counterparts.

* * *

The following elements will close the gap which has developed over the past ten years between Federal Agents/ Officers and State/Local Law Enforcement Officers:

* * *

LOCALITY PAY ADJUSTMENT

* * *

The locality adjustment is considered part of base pay for the computation of overtime, life insurance and retirement benefits and are [sic] subject to bi-weekly pay limitations.

H.R. Conf. Rep. No. 101-906, at 90-91 (1990).

Thus, the plain language and legislative history of FLEPRA indicate that the locality pay benefit is a "special pay adjustment" to be considered part of "base pay." *See* 5 U.S.C. § 5305 note (FLEPRA § 404); H.R. Conf. Rep. No. 101-906, at 91 (1990). The characterization of the benefit as part of "base pay" combined with the congressional goal of closing the pay gap between state/local and federal law enforcement officers suggests that the benefits flowing from the statute were not meant to be discretionary, but are conferred upon LEOs working in selected cities as a matter of law. Similarly, if a federal employee's duties fell within the legal definition of an LEO,[2] then that employee is entitled to LEO credit as a

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[2] "Law enforcement officer" is defined in 5 U.S.C. § 8331(20) (2000), which states, "'Law enforcement officer' means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal

matter of law. See 5 U.S.C. § 8331(20); 5 C.F.R. §§ 831.902. Thus, after this court determined Mr. Crowley's position at the DEA qualified him for LEO credit, plaintiff's claim for FLEPRA benefits was essentially a claim for enforcement of a statutory right to base pay for a position at the DEA to which he had been duly appointed.[3]

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laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position." A definition is also found in 5 C.F.R. § 831.902 (2001), which states:

> Law enforcement officer means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. (*See* 5 U.S.C. 8331(20).) The definition does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal law of the United States.

[3] Defendant also cites to *Bradley v. United States*, 42 Fed. Cl. 333 (1998), in support of its argument that the government's denial of FLEPRA benefits to plaintiff was not a "withdrawal or reduction" in pay as required for compensation under the Back Pay Act. *See* 5 U.S.C. § 5596(b). The Bradley plaintiffs were criminal investigators who qualified for availability pay under the Law Enforcement Availability Pay Act of 1994 (LEAP), Pub. L. 103-329, § 633. Plaintiffs in Bradley sought interest under the Back Pay Act for delayed payment of the availability pay to which the government had already acknowledged plaintiffs were entitled. *Bradley v. United States*, 42 Fed. Cl. at 335. The Bradley court described plaintiffs' claims as follows: "They were not seeking a correction of an unjustified or unwarranted personnel action. No injunctive or declaratory relief was being sought. Plaintiffs were seeking compensation to which the government acknowledged plaintiffs were entitled." *Id.* at 336. Unlike in the instant case, the Bradley plaintiffs were denied interest under the Back Pay Act because, as the court concluded, their claims were not based on an "unjustified or unwarranted personnel action" under the Back Pay Act, but, rather, were claims for "retroactive payments based on an alleged miscalculation or misconstruction of LEAP." *Id.* at 338. In this

In its earlier opinion, this court determined that the decision to deny plaintiff LEO credit was arbitrary, capricious, and not in accordance with the law, and that Mr. Crowley's job duties entitled him to LEO credit and FLEPRA premium pay for positions held between January 1, 1992 and April 1, 2001. *Crowley v. United States*, 53 Fed. Cl. 737. Under the Back Pay Act, plaintiff is entitled to interest on his damage award if an "appropriate authority"[4] determines that, based on "applicable law, rule, regulation, or collective bargaining agreement," plaintiff has "been affected by an unjustified or unwarranted personnel action" resulting in a "withdrawal or reduction" in pay. *See* 5 U.S.C. § 5596(b)(1). Case law has clarified the statutory definition of actions compensable under the Act as those that involve "non-discretionary" benefits of the "virtually automatic" and "noncompetitive" kind. *See Brown v. Sec'y of Army*, 918 F.2d at 220; *Spagnola v. Stockman*, 732 F.2d at 912. After determining plaintiff was qualified for LEO credit, this court's award of FLEPRA back pay to plaintiff was non-discretionary, required by applicable law, and did not constitute discretionary "reclassification." Therefore, plaintiff is entitled to interest on his FLEPRA damage award under the Back Pay Act. *See Brown v. Sec'y of Army*, 918 F.2d at 220; *Spagnola v. Stockman*, 732 F.2d at 912.

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case, however, Mr. Crowley seeks enforcement of his statutory right to FLEPRA benefits, a right that the government previously had denied him.

[4] The Office of Personnel Management regulations state: "Appropriate authority means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including (a) a court . . . ." 5 C.F.R. § 550.803 (2003). Further, in *Hannon v. United States*, 48 Fed. Cl. 15 (2000), a case related to this case, the court determined the United States Court of Federal Claims had authority over the case and denied a motion to dismiss for lack of subject matter jurisdiction, holding that this court had jurisdiction to hear plaintiff's claim for LEO credit and the associated FLEPRA benefits. *Hannon v. United States*, 48 Fed. Cl. at 29.

CONCLUSION

Under the Back Pay Act, 5 U.S.C. § 5596, plaintiff is entitled to interest on FLEPRA section 404 locality pay damages that were awarded to him by this court in *Crowley v. United States*, 53 Fed. Cl. 737. Pursuant to this court's August 30, 2002 opinion and as stipulated to by the parties, Mr. Crowley is entitled to $36,530.00 in damages, plus interest. The clerk's office shall enter JUDGMENT consistent with this opinion.

IT IS SO ORDERED.

MARIAN BLANK HORN, *Judge*

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

[Filed April 18, 2003]

JOHN CROWLEY,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 94-711C

OPINION

HORN, J.

The court is in receipt of defendant's Motion for Reconsideration of the court's opinion regarding the claim of John Crowley for Law Enforcement Officer (LEO) credit and Federal Law Enforcement Pay Reform Act (FLEPRA) benefits for his duties with the Drug Enforcement Agency (DEA) at the Department of Justice (DOJ) from October 1, 1991 through April 1, 2001, and the plaintiff's responses.

FINDINGS OF FACT

The court's August 30, 2002 opinion in this case determined Mr. Crowley's eligibility for LEO credit and FLEPRA benefits for his duties as a Diversion Investigator (DI) with the DEA. *See Crowley v. United States*, 53 Fed. Cl. 737 (2002). Mr. Crowley worked for the DEA and its predecessor, the Bureau of Narcotics and Dangerous Drugs (BNDD) for almost thirty years.[1] The BNDD hired Mr. Crowley in 1973

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[1] Neither party has challenged the factual findings of the court's opinion concerning Mr. Crowley's employment history with the DEA, which

as a Diversion Investigator, with primary duties to investigate the diversion of controlled substances to addicts and drug dealers by doctors, pharmacists, manufacturers and distributors. Mr. Crowley's responsibilities involved investigating doctors and pharmacists who were suspected of distributing controlled substances outside of the usual course of professional practice. *See Crowley v. United States*, 53 Fed. Cl. at 744.

In the opinion, in order to determine Mr. Crowley's qualifications for LEO credit, the court addressed four periods of his employment, which he alleged entitled him to LEO credit. First, the court examined Mr. Crowley's role as a Diversion Investigator in Boston, Massachusetts from 1973 through 1986. At trial, the court heard testimonial evidence that as a Diversion Investigator, Mr. Crowley spent the majority of his time investigating criminal activities, which often included contact with dangerous individuals and situations. *See Crowley v. United States*, 53 Fed. Cl. at 743-44.

The court next reviewed Mr. Crowley's duty as a Diversion Group Supervisor from 1986 through 1991. In this capacity, Mr. Crowley conducted many of the same activities he had pursued as a Diversion Investigator, however, in a supervisory capacity. The court heard evidence that Mr. Crowley encountered armed, criminal suspects and even assisted local police in serving arrest warrants on armed drug dealers, who often resisted arrest and were taken into custody through force, as well as supervised such activity. *See Crowley v. United States*, 53 Fed. Cl. at 744, 751-52.

The court also reviewed Mr. Crowley's role from 1991 though 1994 as a Staff Coordinator in the Office of Diversion at DEA headquarters in Arlington, Virginia. As a Staff Coor-

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are, therefore, incorporated into this order. In this motion for reconsideration, the defendant only asserts that Mr. Crowley did not file any administrative claims after June 15, 1997.

dinator, Mr. Crowley supported, funded, advised, monitored and coordinated investigations conducted by various divisions of Diversion Investigators. During his tenure at DEA headquarters, Mr. Crowley also was selected to work as a Staff Coordinator in the newly formed International Drug Unit. See *Crowley v. United States*, 53 Fed. Cl. at 754-55.

Finally, the court reviewed Mr. Crowley's duties as a Diversion Group Supervisor in Boston, Massachusetts, from 1994 through 2001. In this capacity, Mr. Crowley held many of the same responsibilities he had held when he was previously a Group Supervisor, including paying and directing informants, effecting arrests and investigating criminal drug related activity. *See Crowley v. United States*, 53 Fed. Cl. at 756.

In January, 1977, Donald E. Miller, Acting Deputy Administrator of the DEA, issued a memorandum clarifying the DEA's policy regarding the duties of Diversion Investigators and limiting their law enforcement roles and responsibilities. The memorandum restricted the Diversion Investigators' participation in undercover evidence purchases, directing informants, conducting moving surveillance and executing search warrants. In 1984, Francis M. Mullen, then DEA Administrator, restricted the responsibilities of Diversion Investigators even further by issuing another memorandum restricting the ability of Diversion Investigators to conduct undercover activities of any kind, from direct involvement in the execution of arrest or search warrants, and from conducting surveillance or paying informants. *See Crowley v. United States*, 53 Fed. Cl. at 744-45. Despite these restrictions, it was clear from the trial testimony that Mr. Crowley was not shielded from participating in such activities or from the dangers associated with his actual job responsibilities on a daily basis. *Id.* at 746.

In 1990, Congress established a retirement and pay benefit system for federal law enforcement officers, making them eligible for enhanced pay and early retirement pursuant to the

Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101509, §§ 401-412, 104 Stat. 1389, 1465-69. The regulations setting forth the standards for qualifying as an LEO are found at 5 C.F.R. §§ 831.903 - 831.911, and identify two methods for claiming LEO credit. The first method for receiving LEO credit occurs when an agency determines that a position qualifies for LEO credit. See 5 C.F.R. §§ 831.903(a), 831.904(a).[2] The second method for receiving LEO credit involves the claimant filing an administrative claim through the Office of Personnel Management (OPM), or the relevant agency personnel office, in the instant case, the Justice Management Division (JMD) of the DOJ to request credit for service. *See* 5 C.F.R. § 831.906(b).[3] The granting of LEO status entitles the claimant to FLEPRA benefits. Mr. Crowley submitted administrative claims to the OPM, which credited him with primary LEO credit for the period from June 15, 1974 through June 15, 1986, secondary supervisory LEO credit from June 16, 1986 through February 24, 1991, and secondary administrative credit from February 25, 1991 through September 30, 1991. *See Crowley v. United States*, 53 Fed. Cl. at 757.

Following February, 1991, Mr. Crowley filed annual administrative claims for LEO credit with OPM, and later, as required, with his employing agency, the JMD of DOJ. Neither JMD nor DOJ acted upon Mr. Crowley's claims until 1994, when Deputy Assistant Administrator for Personnel, Jean D. Mathis, found that Mr. Crowley's position as a Staff Coordinator at DEA headquarters "has been determined by OPM to meet the law enforcement criteria; that is, it is an administrative position for which primary law enforcement experience is the prerequisite. Therefore, continued law en-

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[2] Before 1994, this regulation was in 5 C.F.R. §§ 831.905-831.906 (1993).

[3] Before 1994, this regulation was in 5 C.F.R. § 831.908(b) (1993).

forcement coverage in the secondary category is recommended for DI Crowley." *Crowley v. United States*, 53 Fed. Cl. at 758. In August, 1999, almost five years later, the JMD reversed this decision and denied all of Mr. Crowley's administrative claims for LEO credit from October 1, 1991 through June 15, 1997.

Mr. Crowley filed suit in this court seeking LEO credit in the secondary administrative category from October 1, 1991 through October 30, 1994 and LEO credit in the secondary supervisory category from October 31, 1994 through October 1, 2001. Mr. Crowley also sought overtime pay under 5 U.S.C. § 5542 (2000), Administratively Uncontrollable Overtime (AUO) pay pursuant to 5 U.S.C. § 5545(c)(2) and availability pay under 5 U.S.C. § 5545(a). Following trial held in Boston, Massachusetts and Washington, D.C., the court denied Mr. Crowley's claims for overtime pay, AUO and availability pay, but found that Mr. Crowley qualified for LEO credit from October 1, 1991 through April 1, 2001, entitling him to premium pay under FLEPRA § 404. *See Crowley v. United States*, 53 Fed. Cl. at 792.

DISCUSSION

A motion for reconsideration is permitted under Rule 59 of the Rules of the United States Court of Federal Claims (RCFC), which provides that reconsideration "may be granted to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RCFC59(a)(1).

The United States Court of Appeals for the Federal Circuit has stated that: "The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir.), *reh'g denied* (1990). *See Citizens Fed. Bank, FSB v. United States*, 53 Fed. Cl. 793, 794 (2002) (citing *Yuba*

Natural Res., Inc. v. United States, 904 F.2d at 1583). To prevail, a motion for reconsideration "must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court." *Circle K Corp. v. United States*, 23 Cl. Ct. 659, 664-65 (1991); *see also Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002); *Stelco Holding Co. v. United States*, 42 Fed. Cl. 156, 157 (1998); *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993), *aff'd*, 50 F.3d 1021 (Fed. Cir.), *reh'g denied* and en banc suggestion declined (1995). In order to prevail on a motion for reconsideration, the movant must show that: (a) an intervening change in the controlling law has occurred; (b) evidence not previously available has become available; or (c) that the motion is necessary to prevent manifest injustice. *See Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992); *see also Strickland v. United States*, 36 Fed. Cl. 651, 657 (1996). "A court, therefore, will not grant a motion for reconsideration if the movant 'merely reasserts . . . arguments previously made . . . all of which were carefully considered by the Court.'" *Ammex, Inc. v. United States*, 52 Fed. Cl. at 557 (quoting *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. at 164) (emphasis in original); *see also Frito-Lay of P.R., Inc. v. Canas*, 92 F.R.D. 384, 390 (D.P.R. 1981).

In its motion for reconsideration, the defendant argues that plaintiff is not entitled to FLEPRA benefits for any period after June 15, 1997. The defendant bases this argument on its allegation that the plaintiff, Mr. Crowley, did not file administrative claims for LEO credit or FLEPRA benefits in this time period, and that "Plaintiff's Failure To File An Administrative Claim For Any Time Period After June 15, 19[9]7 Precludes An Award Of FLEPRA Benefits For That Period." Defendant does not appear to dispute that Mr. Crowley filed administrative claims from 1991 through 1997 and that those claims were denied by DOJ on August 16, 1999.

Before trial, the court responded to a government motion to dismiss, which similarly argued "This Court Should Dismiss The Plaintiffs' FLEPRA Claims Because Plaintiffs Have Failed To Exhaust Their Administrative Remedies And These Claims Are Accordingly Not Yet Ripe." The defendant filed its motion in all the consolidated cases *Hannon v. United States*, including Mr. Crowley's case. After briefing by both parties, the court responded to the government's motion with an eighteen-page opinion addressing the defendant's exhaustion argument in depth and denying the motion. *See Hannon v. United States*, 48 Fed. Cl. 15 (2000). When the court issued its opinion dismissing defendant's motion, it applied the opinion to all plaintiffs in the consolidated cases, including Mr. Crowley's. While the Westlaw version of the court's opinion lists only the Hannon case number, the court's actual opinion filed with the Clerk of the Court and issued to all plaintiffs and defendant on October 6, 2000, clearly stated "Case Nos. 91-1334C, *et al.*," which includes all consolidated cases. Therefore, when the court denied the defendant's motion, and found that the consolidated plaintiffs were not required to exhaust administrative remedies, it applied this ruling to all plaintiffs in the cases consolidated under *Hannon v. United States, et al.*, including Mr. Crowley's case. Thus, the issue raised by defendant was addressed before the Crowley case went to trial.

"The doctrine of exhaustion of administrative remedies is one among related doctrines-including abstention, finality, and ripeness-that govern the timing of federalcourt decision making." *McCarthy v. Madigan*, 503 U.S. 140, 144, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992). The doctrine is well established in the jurisprudence of administrative law, *see McKart v. United States*, 395 U.S. 185, 193, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969), and provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51,

82 L. Ed. 638, 58 S. Ct. 459 (1938); accord *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998); *Burlington N. R.R. Co. v. United States*, 752 F.2d 627, 629 (Fed. Cir. 1985).

When deciding whether to require exhaustion of particular administrative remedies, the court first looks to congressional intent as expressed in the relevant statute. *See McCarthy v. Madigan*, 503 U.S. at 144; *see also Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501-02, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). "Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. at 144 (citations omitted); accord *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

The mandate that a plaintiff exhaust all administrative remedies before instituting a lawsuit in this court is intended to "serve the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. at 145. In other words, the doctrine seeks to affirm the authority Congress has given administrative agencies to administer programs or interpret statutes. *See McCarthy v. Madigan*, 503 U.S. at 145. In addition, it promotes judicial efficiency by mooting judicial controversies that an agency can decide with special expertise. *See McCarthy v. Madigan*, 503 U.S. at 145; *see also Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210, 1214 (Fed. Cir.), *reh'g and reh'g en banc denied* (2001).

However, "'administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.'" *McCarthy v. Madigan*, 503 U.S. at 146 (quoting *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980)); *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13, 146 L. Ed. 2d 1, 120 S.

Ct. 1084, *reh'g denied*, 529 U.S. 1095 (2000) ("Doctrines of 'ripeness' and 'exhaustion' contain exceptions, however, which exceptions permit early review when, for example, the legal question is 'fit' for resolution and delay means hardship, or when exhaustion would prove 'futile[.]'" citing *McCarthy v. Madigan*, 503 U.S. at 147-48) (other citations omitted).

Individual litigant's interests weigh against exhaustion in three broad circumstances. First, exhaustion may not be required when exhaustion of the administrative remedy may prejudice the plaintiff. *See Maggitt v. West*, 202 F.3d at 1377 (citing *McCarthy v. Madigan*, 503 U.S. at 146-48). "Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. at 147. In *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973), although discussing state administrative remedies, the United States Supreme Court wrote: "State administrative remedies have been deemed inadequate by federal courts and hence not subject to the exhaustion requirement . . . most often . . . because of delay by the agency . . . ." Such delay is not characterized by any specific time limit in which to respond to claims. *See, e.g., Walker v. Southern Ry. Co.*, 385 U.S. 196, 198, 17 L. Ed. 2d 294, 87 S. Ct. 365 (1966), *reh'g denied*, 385 U.S. 1020 (1967) (holding that plaintiffs are not required to wait ten years or more on the administrative board to decide their claim); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591-592, 70 L. Ed. 747, 46 S. Ct. 408 (1926) (finding that an injured public service company "is not required indefinitely to await a decision of the ratemaking tribunal before applying to a federal court . . . .").

Second, the administrative remedy may be inadequate because, even if an agency can adjudicate the issue presented, it may not have authority to grant the type of relief requested. *McCarthy v. Madigan*, 503 U.S. at 147 (citing *Gibson v. Berryhill*, 411 U.S. at 575 n.14); *see also McNeese v. Bd. of*

Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 675, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963) (finding that student plaintiffs did not have to exhaust administrative remedies when the school superintendent did not have authority to grant the requested relief).

Third, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. at 148 (citing *Gibson v. Berryhill*, 411 U.S. at 575 n.14; *Houghton v. Shafer*, 392 U.S. 639, 640, 20 L. Ed. 2d 1319, 88 S. Ct. 2119 (1968)). For example, the United States Supreme Court in *Houghton v. Shafer* held that it would be futile to require the petitioner to exhaust the administrative remedy of appeal to the Attorney General of Pennsylvania, or another officer, in light of the Attorney General's submission that the rules were "validly and correctly applied to petitioner" and "strictly enforced throughout the entire correctional system . . . ." *Houghton v. Shafer*, 392 U.S. at 640.

In the court's previous opinion denying defendant's motion to dismiss, the court found that Congress did not explicitly require exhaustion of administrative remedies under FLEPRA, and that FLEPRA does not mention any administrative prerequisites to filing a suit. *See* 5 U.S.C. § 5305; 5 U.S.C. § 8347(d)(1); 5 U.S.C. § 8461(e); *Hannon v. United States*, 48 Fed. Cl. at 23, 27. *See also Aldrich v. United States*, 31 Fed. Cl. 554, 556 (1994), *aff'd*, 56 F.3d 83 (Fed. Cir. 1995) (finding that Congress did not mandate administrative appeals of premium pay decisions); *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002) (citing *McCarthy v. Madigan* and holding that when Congress does not clearly mandate exhaustion, its requirements are left to the discretion of the trial court).

While the JMD had the authority to grant the type of relief requested, specifically, to qualify Mr. Crowley for LEO credit and FLEPRA benefits, the court's reasoning for not requiring

Mr. Crowley to exhaust his administrative remedies before bringing suit in this court were two-fold. First, requiring Mr. Crowley to pursue his administrative remedies would have been futile because of the JMD's demonstrated failure to adjudicate LEO claims in a timely manner. *See McCarthy v. Madigan*, 503 U.S. at 147 (holding that unreasonable or indefinite delays for administrative action can prejudice a plaintiff). As found in the court's previous opinion, of the 145 diversion investigators who had applied for retroactive LEO retirement credit, only nine had received final decisions in 1995. As of August, 2000, still less than half of the applications had been acted upon. *See Hannon v. United States*, 48 Fed. Cl. at 27-28. Subsequently, JMD did act on, but continued to systematically reject, a number of additional claims of other plaintiffs in the consolidated cases. In Mr. Crowley's case, he filed claims for LEO credit beginning in February, 1992, and it was not until July, 1999 that the OPM summarily denied his benefits. *See Crowley v. United States*, 53 Fed. Cl. at 757-58. This was a full seven years after Mr. Crowley filed his first claim for LEO credit. Thus, to require Mr. Crowley to continually file LEO claims would have been futile and contrary to established Supreme Court precedent, since the JMD continually delayed in making final determinations of FLEPRA benefits, and Mr. Crowley could conceivably have retired before any decisions on his claims were issued. *See McCarthy v. Madigan*, 503 U.S. at 147.

Second, requiring Mr. Crowley to continually file administrative claims would have been futile because the JMD had demonstrated predetermination of the outcome for the type of claims at issue. *See McCarthy v. Madigan*, 503 U.S. at 148 (holding that "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it."); *Houghton v. Shafer*, 392 U.S. at 640 (holding that appealing to an administrative agency is futile when the agency strictly applies a policy to each case); *Aldrich v. United States*, 31 Fed. Cl. at

557 (holding that "the interests of the individual 'weighs heavily against requiring administrative exhaustion' . . . where the administrative body is shown to have predetermined the issue," citing *McCarthy v. Madigan*, 503 U.S. at 140). Specifically, this court determined that the DEA and DOJ adopted the position that Diversion Investigators do not qualify for LEO credit or FLEPRA benefits, regardless of their individual assignments, and this predetermination was reflected in the JMD's August 1999 decision summarily denying all of Mr. Crowley's administrative claims from October 1991 through June 15, 1997, as well as the consistent denial of all similar claims submitted by other plaintiffs in the consolidated action. *See Crowley v. United States*, 53 Fed. Cl. at 758. Because the DOJ proved its lack of an open mind and demonstrated predetermination of the issue by summarily refusing to assign Mr. Crowley and the other Diversion Investigators LEO credit, this court determined that their continual efforts to file administrative claims would be futile.

The defendant states in its motion for reconsideration that in the earlier opinion on the motion to dismiss, the court addressed "solely whether the Court has jurisdiction, not whether the filing of an administrative claim is a regulatory prerequisite to FLEPRA benefits." While the court addressed whether it had jurisdiction to hear the cases, it also analyzed the regulatory requirements for obtaining FLEPRA benefits. For example, in its October 6, 2000 opinion, the court stated that "FLEPRA does not mention an administrative prerequisite to filing a suit, in contrast to the federal retirement statutes which have explicit provisions for the administrative process to file and review claims." *Hannon v. United States*, 48 Fed. Cl. at 27. As a practical consideration, the court could not have concluded that it had jurisdiction if it had not first determined whether there were any administrative, regulatory requirements the plaintiffs were required to pursue before bringing their cases to this court.

The defendant's motion for reconsideration also argues that "the Court's conclusion concerning exhaustion of administrative remedies was premised upon the futility of requiring plaintiffs to await the agency's decision on pending administrative claims." (emphasis in original). By advancing this argument, the defendant appears to assume that the court's written discussion on exhaustion of administrative remedies applies only to those plaintiffs who had actually filed a claim with the administrative agency and were awaiting a final decision on those claims. As the plaintiff stated, "Defendant apparently wants the Court to find a difference between plaintiffs who filed administrative claims but who did not wait for final decisions and those plaintiffs who never filed administrative claims." The court does not take such a narrow view of its previous opinion, nor did it intend to limit its discussion only to those plaintiffs who have filed administrative claims.

When the court filed its opinion denying defendant's motion to dismiss, there were 260 Diversion Investigators with cases pending in this court, of whom only 145 plaintiffs had filed administrative claims with the relevant agency. *See Hannon v. United States*, 48 Fed. Cl. at 19. Had the court intended to exercise jurisdiction only over those investigators with pending claims, it would have clearly identified this intent. Although the court did not readdress the exhaustion argument in its trial opinion in this case, the defendant cannot expect that the efficiency of the judicial process requires the court to address claims previously decided.

Under the circumstances of the case before the court, and during the time period in question, the court found and finds no difference between the Diversion Investigator who had filed a claim, and the Diversion Investigator who had not filed an administrative claim with a system which was both untimely in processing the claims and which had predetermined the result. In *Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001), the United States Court of

Appeals for the Federal Circuit found that ripeness and jurisdiction were not dependant on a plaintiff filing an administrative claim in cases in which it would have been futile to file prepayment requests to the Department of Housing and Urban Development because the agency had no discretion to deviate from statutory requirements and approve the requests. In the instant case, the futility has been demonstrated by DOJ's refusals and laggard actions on many similar claims and DOJ's clear predetermination of the issues presented by similar claims as a result of a pattern of consistent denials.

Neither the plaintiff, the defendant, nor any future plaintiff in a similar matter, however, should construe the court's decision as permitting an open avenue to circumvent JMD's or any other agency's administrative process. The need to advise an agency of a party's claim against the agency is sound public policy in normal circumstances. However, when the agency changes the circumstances by making claim procedures meaningless, such as in Mr. Crowley's case, the courts should be available for relief when exhaustion is demonstrated to be futile. In this case, Mr. Crowley has set forth uncontested facts demonstrating that it would have been futile for him to file further administrative claims for FLEPRA benefits with the JMD. Although under the circumstances of this case, the court draws no distinction between a Diversion Investigator who has filed an administrative claim and one who did not, other plaintiffs must demonstrate, on a case-by-case basis, that it would have been futile to submit an administrative claim. *See Cienega Gardens v. United States*, 265 F.3d at 1248.

Finally, attached to plaintiff's Opposition to Defendant's Motion for Reconsideration, plaintiff submitted new evidence demonstrating that indeed Mr. Crowley had filed administrative claims for at least one of the years after July 15, 1997. Specifically, plaintiff submitted evidence that Mr. Crowley filed a claim for the period June 16, 1997 through June 16, 1998. The court, however, need not review nor

entertain this newly offered evidence to reach its decision concerning Mr. Crowley's qualifications for LEO credit and FLEPRA benefits. It is interesting, however, that defendant asserted that no claims had been filed by Mr. Crowley after June 15, 1997, apparently without carefully searching its own records, raising questions as to what a thorough search might reveal. The court has determined that Mr. Crowley's attempts to file administrative claims were and would have been futile because the JMD not only significantly delayed Mr. Crowley's claims, but summarily denied all claims from this and other similarly situated plaintiffs.

CONCLUSION

The defendant asserts that the court cannot grant FLEPRA benefits to the plaintiff because he did not file administrative claims during any period after July 15, 1997. Since Congress did not require exhaustion of administrative remedies in FLEPRA cases, and because the court found exhaustion under the circumstances of this case to be futile, this court found that exhaustion of administrative remedies was not required. After reviewing the particular work and duties performed by Mr. Crowley as a Diversion Investigator, Group Supervisor and Staff Coordinator, the court determined that Mr. Crowley was entitled to LEO credit and FLEPRA benefits as described in the court's August 30, 2002 opinion. Because the defendant has not produced any newly discovered evidence to the contrary, has not raised previously unconsidered arguments, and has not demonstrated a manifest error of law or fact, the defendant's motion for reconsideration of the court's August 30, 2002 opinion is DENIED.

IT IS SO ORDERED.

MARIAN BLANK HORN, JUDGE

APPENDIX E

UNITED STATES COURT OF
FEDERAL CLAIMS

[Filed August 30, 2002]

No. 94-711C

JOHN CROWLEY,

Plaintiff,

v.

UNITED STATES,

Defendant.

OPINION

Judges: MARIAN BLANK HORN, *Judge.*

Opinion By: MARIAN BLANK HORN

BACKGROUND

Congress has established a special retirement system for federal law enforcement officers (LEOs), granting Law Enforcement Officers entitlement to an annuity at a younger age and with fewer years of service than other federal employees. 5 U.S.C. § 8336(c)(1) (2000). In addition to the special retirement system, Law Enforcement Officers are eligible for enhanced pay under certain circumstances, pursuant to the Federal Law Enforcement Pay Reform Act of 1990 (FLEPRA), Pub. L. No. 101-509, §§ 401-412, 104 Stat. 1389, 1465-69.[1]

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[1] Sections 401-407 and 412 of FLEPRA are found at 5 U.S.C. § 5305 note (2000). Section 408 is codified at 5 U.S.C. §§ 4521-4523, 5541 note; section 409 at 5 U.S.C. § 8335 and 5 U.S.C. § 8425; section 410 at 5 U.S.C. §§ 5542, 5547 (repealed in part by the Technical and Miscellaneous Civil

A "law enforcement officer" is defined in the statute as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position." 5 U.S.C. § 8331(20). The definition of "law enforcement officer," set forth in 5 U.S.C. § 8331(20), governs the determination of whether an employee is entitled to FLEPRA benefits. *See* 5 U.S.C. § 5541(3)(A). Pursuant to the regulations promulgated under 5 U.S.C. § 8347, there are three categories of positions that qualify for Law Enforcement Officer credit: (1) primary; (2) secondary supervisory; and (3) secondary administrative. Each category establishes separate requirements for entitlement. *See* 5 C.F.R. § 831.902 (2002).

The regulations setting forth the standards for qualification as an Law Enforcement Officer are found at 5 C.F.R. §§ 831.903-831.911. There are two methods for claiming entitlement to law enforcement officer status in any of the three categories. 5 C.F.R. §§ 831.905-831.910. First, an agency may determine that the duties of a position meet the criteria for an Law Enforcement Officer position. *See* 5 C.F.R. §§ 831.903(a), 831.904(a) (2001).[2] Alternatively, "an employee who is currently serving in a position that has not been approved by OPM as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position and that he or she satisfies the conditions for credit must" submit an application for credit to OPM through the current employing agency. 5

Service Amendments Act of 1992, Pub. L. No. 102-378, § 2(43)), 106 Stat. 1346, 1352; and section 411 at 5 U.S.C. § 5541.

[2] Prior to 1994, the regulation allowing an agency to determine Law Enforcement Officer status was contained in 5 C.F.R. §§ 831.905-831.906. *See, e.g.*, 5 C.F.R. §§ 831.905-831.906 (1993).

C.F.R. § 831.906(b).[3] For requests from individuals from 1990 to 1993, the employing agency also was required to submit "an advisory opinion to OPM as to whether it believes the individual's service in the position should or should not be credited and, if it qualifies, whether it should be a primary or secondary position." 5 C.F.R. § 831.908(b) (1993). Coverage "in a position or credit for service will not be granted for a period greater than 1 year prior to the date that the request from an individual is received by the employing agency . . . ." 5 C.F.R. § 831.906(e) (2002).[4] Regarding individual requests for coverage, "the employee bears the burden of proof with respect to credit under 5 U.S.C. 8336(c)." 5 C.F.R. § 831.906(a).[5]

Plaintiff, John Crowley, is one of a number of plaintiffs who have filed claims in this court for Law Enforcement Officer credit. The plaintiffs in these consolidated cases are two hundred forty-nine[6] Diversion Investigators (DIs), employed by the Drug Enforcement Administration (DEA), which is an agency within the Department of Justice (DOJ). The plaintiffs are classified as GS/GM-1810 and range from grade five through grade sixteen on the federal pay scale. The plaintiffs allege that the decision to deny them overtime compensation and benefits in accordance with FLEPRA while providing such compensation to Special Agents, GS-1811 Criminal Investigators, also employed by the DEA, is arbitrary, capricious and not in accordance with the law. The plaintiffs seek relief in this court pursuant to 28 U.S.C. § 1491 (2000), and the Back Pay Act, 5 U.S.C. § 5596 (2000), because of the defendant's refusal to pay them premium and

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[3] Prior to 1994, the quoted language was contained in 5 C.F.R. § 831.908(b). *See, e.g.*, 5 C.F.R. § 831.908(b) (1993).

[4] Prior to 1994, the quoted language was contained in 5 C.F.R. § 831.908(e). *See, e.g.*, 5 C.F.R. § 831.908(e) (1993).

[5] Prior to 1994, the quoted language was contained in 5 C.F.R. § 831.908(a). *See, e.g.*, 5 C.F.R. § 831.908(a) (1993).

overtime pay, as allegedly required pursuant to FLEPRA, administratively uncontrollable overtime (AUO), as provided by 5 U.S.C. § 5545(c)(2), and availability pay, as provided by 5 U.S.C. § 5545a. The plaintiffs argue that under the applicable law they are Law Enforcement Officers, entitled to receive the same compensation as other DEA Law Enforcement Officers, including Special Agents, based on the actual work performed by them during the course of their employment.[6]

Three individual cases were selected by the parties to serve as the test plaintiffs for this matter: *John W. Partridge v. United States*, Case No. 94-819C, *John D. Crowley v. United States*, Case No. 94-711C, and *John Buckley v. United States*, 51 Fed. Cl. 174, Case No. 92-469C. Originally, the test cases were selected to cover three categories of plaintiffs: (1) Diversion Investigators; (2) Diversion Group Supervisors; and (3) those from the above two categories who transferred to administrative positions. In addition, the test cases represent plaintiffs from DEA offices in three different geographical regions: Los Angeles, California; Boston, Massachusetts; and Arlington, Virginia. According to the plaintiffs, Mr. Buckley's case was initially "selected for trial as representative of those plaintiffs in the instant case who had transferred initially from Diversion Investigator positions to administrative positions, either directly or from supervisory positions." In contrast, "Mr. Crowley's case was selected for trial as representative of those plaintiffs who had filed suit in the above-captioned cases and who transferred from Diversion Investigator primary positions to supervisory positions in DEA."

On December 6, 2001, the court issued a decision in *Buckley v. United States*, 51 Fed. Cl. 174 (2001). In its decision, the court found that two of Mr. Buckley's administrative positions, first as a Staff Coordinator in the Office of Diversion

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[6] Since the court issued its opinion in *Buckley v. United States*, 51 Fed. Cl. 174, eleven plaintiffs have voluntarily dismissed their claims.

in DEA headquarters in Arlington, Virginia, and then as the Deputy Chief of Diversion, qualified him for Law Enforcement Officer credit. *Id.* at 212-214. The court also found, however, that Mr. Buckley's administrative position as an Inspector at the Office of Inspections did not qualify him for Law Enforcement Officer credit. *Id.* at 216. In determining whether Mr. Buckley's administrative positions qualified him for Law Enforcement Officer credit, the court was required to determine, and did find that, his primary and supervisory positions also qualified for Law Enforcement Officer credit. *Id.* at 178. Therefore, as the court has interpreted the statute and regulations, Mr. Buckley's claims raised issues previously reserved for Mr. Crowley's case.

Mr. Crowley has raised the following claims: (1) qualification for a special rate of pay for employees at grades GS-3 through GS-10 pursuant to FLEPRA section 403, 5 U.S.C. § 5305 note (2000); (2) qualification for a special rate of pay for employees who were posted for duty in one of eight specified metropolitan areas pursuant to FLEPRA section 404, 5 U.S.C. § 5305 note; (3) eligibility for premium pay for working scheduled overtime work compensated at the greater of one hundred fifty percent of the GS-10 hourly pay rate, or his own hourly pay rates, pursuant to FLEPRA section 410, 5 U.S.C. §§ 5542, 5547; (4) qualification for premium pay on an annual basis for AUO, at an appropriate percentage, not in excess of twenty-five percent, of such part of the basic pay for the position that does not exceed the minimum rate of basic pay for GS-10, pursuant to 5 U.S.C. § 5545(c)(2)[7]; and (5) eligibility for premium pay given to ensure the availability

[7] According to plaintiff's brief, Mr. Crowley does not seek unpaid AUO for any period prior to August 2, 1985, because of the six year statute of limitations established by 28 U.S.C. § 2501 (1994). Mr. Crowley filed his claim, however, on October 12, 1994. Therefore, the statute of limitations would bar Mr. Crowley's claims for AUO prior to October 12, 1985.

of criminal investigators for unscheduled duty in excess of a forty hour work week at a rate of twenty-five percent of the rate of basic pay for the position, pursuant to 5 U.S.C. § 5545a.[8]

DEA's predecessor, the Bureau of Narcotics and Dangerous Drugs (BNDD), established the Diversion Control program in 1971, following passage of the Controlled Substances Act of 1970 (CSA), Pub. L. No. 91-513, 84 Stat. 1242 (codified at 21 U.S.C. §§ 801 *et seq.* (1994 & Supp. V 1999)). One of the purposes of the CSA was to combat the illegal diversion of controlled substances to addicts and drug dealers by doctors, pharmacists, manufacturers and distributors. The Act established requirements for the use, storage and distribution of controlled substances, and made the diversion of controlled substances a violation of law punishable under the criminal statutes of the United States. Duties of Diversion Investigators include investigating violations of criminal laws with respect to the diversion of controlled substances into illegal channels and assuring compliance with the requirements created by the CSA.

Diversion Investigators have not been considered by the DEA as meeting the definition of an Law Enforcement Officer for premium pay purposes. Diversion Investigators have not been paid under special pay provisions of FLEPRA and have not received pay for AUO pursuant to 5 U.S.C. § 5545(c)(2) (2000). DEA has adopted the position that once an employee is determined to be entitled to Law Enforcement Officer retirement credit for a period of time subject to FLEPRA, that employee will be paid premium pay pursuant

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[8] Although a FLEPRA section 407 claim is discussed in some of the papers filed with the court, this claim is not mentioned in either the plaintiff's initial complaint or its second amended complaint, which was filed on March 5, 2001. Because the second amended complaint establishes the claims before the court, the merits of a FLEPRA section 407 claim will not be addressed.

to FLEPRA as follows. DEA will pay the employee premium pay pursuant to FLEPRA section 403, 5 U.S.C. § 5305 note, for any period of time, subsequent to the effective date of FLEPRA section 403, for which it is determined: (1) that the employee is entitled to Law Enforcement Officer retirement credit and (2) that the employee satisfies the requirements of FLEPRA section 403. DEA will pay the employee premium pay pursuant to FLEPRA section 404, 5 U.S.C. § 5305 note, for any period of time, subsequent to the effective date of FLEPRA section 404, for which it is determined: (1) that the employee is entitled to Law Enforcement Officer retirement credit and (2) that the employee satisfies the requirements of FLEPRA section 404 and 5 C.F.R. §§ 531.301-531.306 (2002).[9] DEA will pay the employee premium pay pursuant to FLEPRA section 410, 5 U.S.C. §§ 5542, 5547, for any period of time, subsequent to the effective date of FLEPRA section 410, for which it is determined: (1) that the employee is entitled to Law Enforcement Officer retirement credit and (2) that the employee satisfies the requirements of FLEPRA section 410. Each Diversion Investigator who meets the requirements for premium pay pursuant to FLEPRA discussed above, will be paid retroactively, the amount to which he or she is entitled.

Two hundred forty-nine Diversion Investigators have cases pending in this court. One hundred forty-five of the original plaintiffs have applied to the DEA and/ or the Justice Management Division (JMD), a division of the DOJ, for Law Enforcement Officer retirement credit under the Civil Ser vice Retirement System (CSRS), as provided by 5 U.S.C. §§ 8331(20), 8336(c) (2000), and under the Federal Employee Retirement System (FERS), as provided by 5 U.S.C. §§ 8401(17), 8412(d). By 1995, the JMD only had issued

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[9] Subpart C-Special Pay Adjustment for Law Enforcement Officers, was first published at 57 Fed. Reg. 2431 (Jan. 22, 1992) (codified as amended at 5 C.F.R. §§ 531.301-531.305 (1993)).

final orders on nine of the one hundred forty-five pending applications. Subsequently, the JMD issued additional decisions, but as discussed at numerous status conferences with the court, the rate of decision making at DOJ was, at best, extremely slow. All nine of the applications decided by 1995 were denied, and each affected Diversion Investigator filed an appeal to the Merit Systems Protection Board (MSPB).

The nine cases were consolidated on appeal, and two of the cases, James T. Hannon and Ronald J. Townsend, proceeded to a hearing on December 11, 1995. The remaining seven appeals were stayed at the MSPB pending final resolution of the two designated cases. On April 30, 1997, MSPB Administrative Judge Jenkins issued a decision reversing the JMD's denial of Law Enforcement Officer retirement credit, concluding that both plaintiffs were entitled to Law Enforcement Officer retirement credit under their respective retirement systems. The government filed a Petition for Review before the MSPB on June 3, 1997. The MSPB issued a final decision in the case of James T. Hannon on June 11, 1999, reversing the Administrative Judge's decision. The MSPB decision found that Mr. Hannon was not entitled to Law Enforcement Officer retirement credit under the CSRS, pursuant to 5 U.S.C. §§ 8331(20), 8336(c), consistent with the JMD's denial of Law Enforcement Officer retirement credit. *Hannon v. Dep't of Justice*, 82 M.S.P.R.[10] 315 (1999). The MSPB issued a final decision in the case of Ronald J. Townsend on August 31, 1999, also reversing the Administrative Judge's decision, and similarly holding that he was not entitled to Law Enforcement Officer retirement credit under the FERS, pursuant to 5 U.S.C. §§ 8401(17), 8412(d). *Townsend v. Dep't of Justice*, 83 M.S.P.R. 427 (1999). On December 7, 2000, the United

[10] Although the decisions of the MSPB are officially published in the Decisions of the United States Merit Systems Protection Board (M.S.P.B.), following the Federal Circuit's lead, citations are made to the United States Merit Systems Board Reporter (M.S.P.R.).

States Court of Appeals for the Federal Circuit affirmed the MSPB's decision which had found that James T. Hannon was not entitled to Law Enforcement Officer credit. *Hannon v. Dep't of Justice*, 234 F.3d 674 (Fed. Cir. 2000) (stating that it was unpersuaded that the Board's factual determinations were not based on substantial evidence and declaring that the Board's application of the law to those facts was not arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law), *cert. denied* 534 U.S. 1065, 151 L. Ed. 2d 579, 122 S. Ct. 665 (2001). On June 6, 2001, the United States Court of Appeals for the Federal Circuit affirmed the MSPB's decision regarding *Ronald J. Townsend. Townsend v. OPM*, 13 Fed. Appx. 962 (Fed. Cir. 2001) (using the substantial evidence, arbitrary or capricious, abuse of discretion or otherwise not in accordance with the law standards), *cert. denied*, *Hannon v. Dep't of Justice*, 534 U.S. 1065, 151 L. Ed. 2d 579, 122 S. Ct. 665.

In the Crowley case currently before this court, the defendant filed a motion to dismiss, which the court denied in its opinion of October 6, 2000. *See Hannon v. United States*, 48 Fed. Cl. 15 (2000). Before the case was tried, the parties also filed briefs regarding an issue raised by the plaintiff and jointly stipulated to by the parties as follows:

> Whether the previous decision of the Office of Personnel Management to grant plaintiffs primary law enforcement officer credit is sufficient to satisfy plaintiffs' burden of demonstrating, for purposes of obtaining secondary law enforcement officer credit, that they previously occupied a primary law enforcement officer position or whether plaintiffs must demonstrate, through evidence of their primary job activities, that the primary position they occupied was a law enforcement officer position.

At the pre-trial conference, the court informed the parties that the question raised by the plaintiff's argument would be addressed in the court's final opinion on the merits. The test

case of *Crowley v. United States* was tried in Boston, Massachusetts and Washington, D.C. This opinion addresses each of Mr. Crowley's claims.

FINDINGS OF FACT

Mr. Crowley's career with the DEA, and its predecessor, the BNDD, covers four periods. First, from March 12, 1973 until June 15, 1986, Mr. Crowley served as a Diversion Investigator in the Boston, Massachusetts regional office of the BNDD and, subsequently, the DEA. From June 16, 1986 until February 24, 1991, Mr. Crowley served as a Group Supervisor in the Boston, Massachusetts regional office of the DEA. From February 25, 1991 until October 30, 1994, Mr. Crowley worked as a staff coordinator for the Office of Diversion Control at DEA headquarters in Arlington, Virginia. Finally, on October 31, 1994, Mr. Crowley transferred back to the Boston, Massachusetts regional office as a Group Supervisor. In April of 2001, Mr. Crowley became the Special Assistant to the Diversion Program Manager. Mr. Crowley retired from DEA on October 1, 2001. Testimony and comments by counsel suggest that the Boston, Massachusetts regional office, where Mr. Crowley worked as a Diversion Investigator and Group Supervisor, generally covered six New England states: Maine, New Hampshire, Vermont, Rhode Island, Connecticut and Massachusetts.

Mr. Crowley was recruited in 1973 by Matthew Seifer, a Special Agent who was in charge of the Compliance Group, as the Diversion Group was called at that time. During an interview, Mr. Seifer explained to Mr. Crowley that the government was establishing the Compliance Program to provide oversight of the pharmaceutical industry and to investigate what Mr. Seifer called "bad doctors" and "bad pharmacists." Mr. Seifer warned Mr. Crowley, though, that the job would entail long hours. According to Mr. Crowley, Mr. Seifer told him to "go home and talk to your spouse, talk to your wife, talk to your family because this is not a 9:00 to 5:00 job."

I. Diversion Investigation Duty: 1973-1986

Mr. Crowley spent the majority of his first year as a Diversion Investigator performing regulatory, or "cyclic," investigations. Indeed, according to a DEA study of the Diversion Control Program conducted from May 1982 until April 1983, the Diversion Investigator position was originally created to "ensure[] compliance with the regulatory aspects of the Controlled Substance Act." The regulatory aspects of the Diversion Investigator position center on conducting cyclic (regulatory) investigations, which are "unannounced in-depth audits of controlled substances activity, focusing on production and inventory levels and purchase, transfer, and sales records. Other key activities include the review of internal accounting practices, inventory procedures, security systems, registration information, and existing systems that monitor their customer's purchases/actions." In 1974, however, Mr. Crowley began to work on more criminal investigations. In this regard, the DEA study explained the evolution of the Diversion Investigator program as follows:

> Prior to 1979, the Office of Compliance and Regulatory Affairs devoted most of its investigative resources towards ensuring compliance with the regulatory aspects of the Controlled Substance Act. As DEA re-directed its resources from wholesaler/ manufacturer compliance to retail diversion, a larger portion of its resources were spent on criminal investigations. Currently, while regulatory investigations at the non-practitioner level still remain an intricate part of the diversion effort, criminal retail diversion has emerged as the area of major concern.

The shift toward criminal investigations occurred partly because "by 1977, the Office of Diversion Control concluded that the cyclic investigation program had effectively reduced diversion at the non-practitioner level and that a shift to practitioner level was necessary to attack the growing retail

diversion problem." The DEA study, although critical of the criminal investigation role of Diversion Investigators (GS 1810's) as opposed to DEA Special Agents (GS 1811's), found that Diversion Investigators were doing criminal investigatory work even to the point of finding that the two groups were in "competition in the dangerous drugs area." The report also noted that: "In effect DEA has created and is perpetrat ing a two tier enforcement program. One enforcement effort against practitioner diversion and one enforcement effort against all other drugs. The 1810 core group has in effect become defacto 1811s." The DEA report also noted that "the increased danger to 1810 personnel" as well as "the evolution of a second and separate enforcement effort . . ." was "particularly disturbing," and that "Field OD [Office of Diversion] personnel are directed to work criminal cases." Thus, although the Diversion Investigator position originally may have been created primarily to perform cyclic documentary reviews, the basic reasons for the existence of the position began to shift in the mid-1970's and by 1983, DEA policy "reflected an agency belief that the most effective way to impact diversion [was] through criminal investigations . . . ." and in fact, many Diversion Investigators became primarily criminal investigators.

At trial, Mr. Crowley testified that the first year he worked as a Diversion Investigator, forty to fifty percent of his time was devoted to regulatory investigations.[11] Following that first year, however, the amount of time Mr. Crowley spent on regulatory investigations dropped to fifteen to twenty percent and remained steady through to the time of trial. Ed Sullivan, a Diversion Investigator who worked out of Boston, Massachusetts with Mr. Crowley from 1982 to 1987, testified that, to his knowledge, Mr. Crowley spent one hundred percent of his time on criminal investigations. John Cronin, Mr. Crow-

[11] Mr. Crowley has never requested Law Enforcement Officer credit for his first year as a Diversion Investigator.

ley's Group Supervisor from 1978 to 1982, testified that Mr. Crowley spent the majority of his time as a Diversion Investigator performing criminal investigations. Finally, Dennis Johnson, Mr. Crowley's Group Supervisor from February of 1983 to March of 1984, testified that no more than twenty to twenty-five percent of Mr. Crowley's work was concerned with cyclic investigations.

John Coleman, the Special Agent in Charge of the Boston DEA regional office from 1985 to 1990, testified that the geographic position of the Boston office affected the number of cyclic investigations performed by that office. According to Mr. Coleman, areas with a larger proportion of pharmaceutical manufacturing plants engaged in more cyclic investigations than other, less concentrated areas. Mr. Coleman stated that in New Jersey, where he was Special Agent in Charge from 1994 to 1997, the large number of pharmaceutical manufacturing plants required more cyclic attention. In contrast, other regions, such as those controlled by the Boston office, "do not have pharmaceutical plants or distribution, or distribution warehouses and so forth, and so they have fewer, by number, cyclic investigations assigned to them." Mr. Coleman also testified that in Boston, "the emphasis was definitely on the criminal [investigations]. I mean, I ran three major field divisions in DEA while I was there, Boston, Chicago and New Jersey, and of all three, Boston was probably the most active in terms of criminal investigations," and that in Boston most of the time was spent on criminal investigations.

A Diversion Investigator's criminal responsibilities involved the investigation of doctors and pharmacists who were suspected of distributing controlled substances outside of the usual course of professional practice. To a lesser extent, Diversion Investigators also investigated burglaries of pharmacies. Mr. Crowley used a number of investigatory methods to gather information to support a case for the criminal diversion

of controlled substances, which Mr. Crowley would then present to the United States Attorney's Office. "I saw myself as an, as an investigator, who investigated violations of federal law and brought them to the court," Mr. Crowley testified.

Beginning in 1977, pursuant to DEA policy, Mr. Crowley was limited in the scope of his duties. In January 1977, Donald E. Miller, Acting Deputy Administrator of the DEA, attempted to further define the roles and responsibilities of the Diversion Investigators and issued a memorandum (the Miller Memorandum) aimed to clarify DEA policy regarding the duties of Diversion Investigators. The Miller Memorandum stated:

> Effective immediately, Compliance Investigators[12] will not participate directly in:
>
> (1) Undercover purchase of evidence (investigators may continue to control such cases they have developed involving illegal sale by a registrant, but call upon 1811 assistance for the actual undercover purchases. The 1811, of course, will control the actual circumstances of the buy situation, and the advisability of such an approach).
>
> (2) Direct, register and pay informants-This does not mean 1810's may not interview sources of information, assist in debriefing of established informants relating to diversion or availability of legitimate drugs, however, the controlling and paying of confidential informants will be conducted by GS-1811's;
>
> (3) Conduct moving surveillance-There are limited occasions in which 1810's will conduct activity which may be considered surveillance, such as monitoring

[12] Diversion Investigators were previously known as "compliance investigators," but the two terms describe the same position within DEA.

the number of patients entering a methadone clinic prior to examining records, however, 1811's will conduct activity such as following suspected diverters;

(4) Arrests and execution of search warrants-These activities will be conducted by 1811's. On limited occasions involving registrants, 1810's may be present after the area is secured, for technical assistance in their area of expertise of the case, i.e., identify the drugs present, identify records or documents important to the case, etc.

It is recognized that these criminal investigative functions may complement certain (compliance) investigations being handled by compliance groups in which possible criminal violations have been indicated. In those cases, Regional management should ensure 1811 support is provided in line with case load priority at the time. Additionally, 1810's should be utilized in all cases involving registrants, whether originated by 1810 or 1811 personnel.

(emphasis in original).

On June 18, 1984, Francis M. Mullen, Jr., the Administrator of the DEA at that time, considered restructuring the 1810 position and issued a memorandum (the Mullen Memorandum), affirming the amended restrictions on the duties of Diversion Investigators:

The following enforcement actions will not be conducted by 1810 personnel:

(1) Undercover activities of any kind;

(2) Execution of arrest or search warrant. The 1810 investigator may be present after the area has been secured in order to identify records, documents or drugs;

(3) Conducting of surveillances, either moving or stationary; and

> (4) Developing, direction or paying informants. This does not deny the 1810 the ability to develop or receive information from registrants or drug industry officials who wish to lend their support to investigations or to provide information on diversion. An 1810 investigator may accompany 1811 personnel in the debriefing of informants when such debriefing takes place in a secure premises; for example, a DEA office, police station, etc.

(emphasis in original).

The restrictions established in the Mullen Memorandum were reiterated in the 1984 and the 1990 Diversion Investigator Manuals, as well as in the 1996 Diversion Investigator Manual testified to at trial as the current version. On February 28, 1995, Gene Haislip, then Deputy Assistant Administrator for the DEA, issued a memorandum to all domestic Special Agents in Charge, reiterating the DEA policies regarding the duties of Diversion Investigators and stating:

> Recently, there have been many questions concerning Diversion Investigator (1810) hiring, 1810 duties, etc. I would like to remind everyone that the 1810 work force continues to be required to work under the guidelines of June 18, 1984, issued by then Administrator Francis M. Mullen, Jr., (copy attached) which reiterated the 1977 Memorandum from Donald Miller, then Acting Deputy Administrator.

In this same memorandum, Mr. Haislip again listed the actions which the Diversion Investigators were not supposed to perform.

Harold Wankel,[13] who became familiar with the diversion program from January 1990 to October 1996 as Deputy As-

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[13] Mr. Wankel's testimony on direct and cross-examination in the *Buckley v. United States*, Case No. 92-469, 51 Fed. Cl. 174, trial was designated by the parties to be entered into the record in the instant matter.

sistant Administrator in charge of the Office of Investigative Support and as Chief of Operations for DEA, stated that the purpose behind the Miller Memorandum was "to keep the Diversion Investigators out of harm's way and also to preclude them from getting engaged or involved in activities which they had not been trained in how to conduct or handle."

Despite the restrictions imposed on Diversion Investigators by the Miller and Mullen Memoranda, however, the evidence in the record demonstrates that the Diversion Investigators still often encountered dangerous situations while performing their duties. The record also establishes that although DEA policy, as expressed through the Miller and Mullen Memoranda, prohibited Diversion Investigators from performing certain duties, the practice in the field was different from the stated policy. Mr. Crowley testified that:

> From a personal standpoint, I would say to my group supervisor, who, whoever that was, that I will do my best to stay within the spirit of that memorandum. That, that policy memorandum ... If, if I have to get involved in a, in a situation, if I can, I'll tell you ahead of time. If I, if I can't tell you ahead of time, I'll tell you when its over.

Mr. Crowley also testified that he did not stand outside waiting for a Special Agent to secure the premises during searches, but that he entered the premises with the Special Agents. Furthermore, Mr. Crowley testified that neither the Miller nor the Mullen memorandum completely foreclosed his ability to participate in surveillance. After the distribution of the Miller Memorandum, which forbade moving surveillance, Mr. Crowley continued to conduct moving surveillance with special agents, state or local police. At trial, Mr. Crowley acknowledged that it was his understanding that the Miller Memorandum forbade unilateral moving surveillance. Moreover, following the Mullen Memorandum, which pur-

portedly forbade surveillance altogether, Mr. Crowley testified that "my understanding was that, again, on a unilateral basis, I would not do that on my own, but in conjunction with state or local law enforcement, or our own special agents, I would do it." Finally, Mr. Crowley's supervisors knew that he was performing such activities because he described them in his reports.

Furthermore, even when the Diversion Investigators fully complied with the restrictions set forth in the Miller and Mullen Memoranda, these restrictions did not entirely shield the Diversion Investigators from encountering dangerous situations. The Office of Planning and Evaluation, Planning and Inspection Division at DEA issued a report entitled "Evaluation of the Diversion Control Program," on May 1, 1983. After conducting "research, file review, interviews, quantitative analysis and the on-site review of actual operations," the report included the following findings:

> There is inherent danger in an 1810's job. Whenever an audit is conducted, the possibility exists, although remote, that a registrant or cohort may react unpredictably, at times becoming hostile or irrational. An audit at a Narcotics Treatment Program (NTP) can be particularly dangerous. NTPs are usually located in depressed areas, the clientele are suspicious of Government agents, and frequently illegal activities are suspected at these sites. Although the study team failed to find any recorded incidences of injuries to 1810s conducting audits, 1810 personnel related a number of situations where injuries could have occurred. Whereas the study team is concerned about the 1810's safety regarding their regulatory duties, we are particularly disturbed by the increased danger inherent in criminal investigations . . . With OD's [the Office of Diversion's] aggressive entry into criminal cases the danger factor for 1810s increases substantially.
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> * * *

> While 1811 support varied from office to office, every 1810 group supervisor interviewed related at least one incident where the lack of agent support impacted a case.
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> * * *
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> In effect DEA has created and is perpetuating a two tier enforcement program. One enforcement effort against practitioner diversion and one enforcement effort against all other drugs. The 1810 core group has in effect become defacto 1811s.

On June 14, 1988, Mr. Haislip wrote a memorandum to the Chief of the Congressional Affairs Section of DEA, explaining the hazards faced by Diversion Investigators when interviewing "patients" of the doctors and pharmacists being investigated: "Because of drug use, [the patients'] behavior is seldom predictable. For the Investigator, the situation is at the least very stressful and can be extremely hazardous." On February 13, 1990, a diversion group supervisor wrote a memorandum to the Chief of the Planning and Policy Assessment Unit explaining that although prohibiting Diversion Investigators from performing undercover activities was intended to protect the Diversion Investigators:

> It is far more dangerous for Diversion Investigators to enter a Narcotic Treatment Program (NTP) or Methadone program, which often times treats hundreds of hard core drug addicts in major urban high crime areas (where many NTPs are located), to conduct a regulatory investigation, than it is to do undercover work in a doctor's office.

(emphasis in original).

Mr. Crowley never has had the authority to carry a weapon, to arrest individuals, to work undercover, or to execute search warrants. Before the Miller Memorandum was issued, Mr. Crowley directed informants and under present DEA policy,

Diversion Investigators now can register, direct, and pay informants. Even following the Miller and Mullen Memoranda, however, Mr. Crowley testified that he had substantial involvement with undercover buys. In one situation, Mr. Crowley worked with a Special Agent for assistance in using an informant to make several undercover purchases. Mr. Crowley "directed those undercover purchases of evidence. I handled, I directed the, the informant what to do. I debriefed him beforehand. I debriefed him afterwards. I kept him under surveillance, with the special agents, during the, during the [buy]."

During the trial, Mr. Crowley, his supervisors, and his partners, both from the DEA and from state and local law enforcement, gave a number of examples of the investigations Mr. Crowley performed as a Diversion Investigator. One of the earlier cases testified to involved Bodowin's Drugstore in Kennebunk, Maine. Bodowin's Drug Store was Maine's oldest and largest retail pharmacy. The investigation was initiated after the State of Maine's Board of Registration in Pharmacy notified the Boston DEA regional office that it suspected that Bodowin's was failing to maintain adequate records and that it was diverting controlled substances. Mr. Crowley worked with another Diversion Investigator on the case, Patrick Hunt.

The first step taken by Mr. Hunt and Mr. Crowley in investigating the Bodowin Pharmacy was to apply for an administrative inspection warrant. An administrative inspection warrant allows the government to enter a building used by someone registered to distribute controlled substances and inspect the records and drug stock of the registrant. 21 U.S.C. § 880 (2000). To obtain an administrative inspection warrant, a Diversion Investigator presents a judge or magistrate with a "public interest" in enforcing the drug laws of the United States sufficient to justify an administrative inspection. *Id.* Mr. Crowley testified that he would serve administra-

tive warrants during business hours and attempt to conduct the search without disturbing the activity within the pharmacy. Regardless of the administrative nature of the warrant, however, Mr. Crowley explained that:

> The pharmacist would, would know I was doing something, and it would be kind of a tense situation in many respects, because the, the Drug Enforcement Administration does not inspect retail pharmacies. We haven't got the, the resources, the, the statute was setup to do that as a non-practitioner level; that's the drug company. We did not routinely visit retail pharmacies with an admin warrant. That would be something that would indicate to a reasonably prudent person that something—he might have been in trouble.

Mr. Crowley and Mr. Hunt testified that serving administrative warrants was intensified because some of the pharmacists were armed.

On October 8, 1974, Mr. Hunt swore out an affidavit and an administrative inspection warrant was issued to allow Mr. Hunt and Mr. Crowley to inspect Bodowin's Pharmacy. On the same day, the two began their inspection. Mr. Crowley testified:

> One of the things I remember about that, incidently, is that when we went in there, it was very, very tense. I don't know the reason for that. I thought we conducted ourselves in a reasonable matter [sic], but the entire four days that we were on that location, it was, it was a tense situation.

The focus of Mr. Hunt and Mr. Crowley's search was to establish how the business was being run from an accounting standpoint. As a result of their search, the Diversion Investigators determined that Warren E. Bodowin, the pharmacist and president of Bodowin's Pharmacy, was filing illegitimate prescriptions for drug seeking individuals.

During the inspection, Mr. Crowley and Mr. Hunt advised Mr. Bodowin of his Miranda rights. Subsequently, Mr. Bodowin refused to speak with Mr. Hunt or Mr. Crowley. As a result, the Diversion Investigators developed a different approach to the investigation, deciding to interview about fifty patients to determine if they had legitimately received their prescriptions. Through the interviews Mr. Crowley discovered that a Dr. Cleveland was writing a number of the prescriptions that were being presented in Bodowin's Pharmacy. The interviews further disclosed that the "patients" would pay Dr. Cleveland for an "office visit," spend a minute or two in the office, and receive a prescription. Mr. Crowley testified that: "We found out that there was no legitimate, at least in our opinion, there was no legitimate doctor/patient relationship . . . They would just say that they were here for the drugs." Mr. Crowley testified that he uncovered a "conspiratorial relationship in the sense that his [Dr. Cleveland's] prescriptions were making their way right to his, right to Bodowin's Pharmacy." According to Mr. Crowley, the relationship was necessary because the prescriptions would not have been filed at other pharmacies because they were not properly formatted.

Mr. Crowley also found that many of the patients had long criminal records due to their drug abuse problems. In addition, they had been arrested many times for breaking and entering and for using fraudulent prescriptions to support their drug addiction. Mr. Crowley described one situation in which he and Mr. Hunt participated, which he felt was particularly dangerous:

> So, in order to conduct an interview, you knock on the door and say, and, you know, just wait, and if there is no answer, you knock on the door again. The third time, I just said, "Jack Crowley, Drug Enforcement Administration." You know, kind of stupid probably now that I thought of it, but what was actually happening in that

apartment was there, there were about twenty addicts having a "shoot-em-up party." I mean, they were, they were actively shooting heroin. They were, whatever they do at a drug party . . .

Q. Was there consternation at your arrival?

A. Oh, yes. There was a lot of consternation. Thank goodness I had a certain presence. You know, in retrospect, I, I, I probably burned a good thing. She was never going to say it to me, but I had to clear out the room, tell most of the people in there to leave, go take a walk and come back later. I should have probably called an ambulance for one or two, two of them, but, yeah, we, we had to calm down the activity.

Mr. Crowley and Mr. Hunt presented their findings to the United States Attorney's Office on March 27, 1975. Mr. Bodowin was indicted, but ultimately acquitted, of unlawful distribution of controlled substances. Mr. Bodowin was convicted, however, on state charges of selling drugs to undercover agents. Throughout the prosecution of the Bodowin case, Mr. Crowley worked "unbelievably long hours" and was on call to his group supervisor and the prosecutor.

Edward Drinan, the Special Agent in Charge for the Portland, Maine DEA office from 1977 through 1981, testified about another instance early in Mr. Crowley's career when Mr. Crowley's investigative techniques uncovered a crime. Mr. Drinan received a call from the president of Mercy Hospital in Portland, Maine. The hospital suspected tampering with the painkilling medicine being given to patients. The painkillers were not effective, and as a result, terminally ill patients were dying in great pain. Because Mr. Crowley was in Maine that day, Mr. Drinan considered him, and every DEA employee in Maine, to be on call twenty-four hours a day. Mr. Drinan assigned Mr. Crowley to track how the prescribed painkillers got from the pharmacy to the patient, who

came in contact with the painkillers, and how the painkillers could be diverted. Mr. Drinan testified:

> I sat and held hands with the hospital president while Crowley did his thing. As a result of Jack's efforts, we discovered that a pharmacist employed by the hospital was an opium addict, a drug addict, and that he had, over a period of two months, carefully and meticulously disassembled these powerful painkillers of morphine and dilaudid.

The suspect was taken to the Portland police station where he confessed. Although the pharmacist was only stripped of his license, Mr. Drinan characterized the episode as "an example of a diversion case that has a criminal element in it."

Mr. Crowley also testified regarding his investigation of a burglary at the Wyeth Laboratories distribution center in Andover, Massachusetts. On the morning of September 27, 1976, Mr. Crowley received a call from the warehouse manager of Wyeth Laboratories stating that their distribution center had been broken into and that most of the firm's inventory of Schedule II controlled substances had been stolen. Because the firm was a DEA registrant, Mr. Crowley coordinated the investigation.

Later that morning, Mr. Crowley, Mr. Hunt, and their Group Supervisor, Mr. Seifer, accompanied by state agents, began an on-site investigation of the Wyeth Laboratories distribution center. Mr. Crowley found that the thieves had disabled the security system by cutting the telephone wires, climbed down through a hole in the roof of the building and broken into the vault by burning through a combination lock. Mr. Crowley discovered the severed telephone wires by climbing up the telephone pole to see where the alarm system had been cut. Mr. Crowley discovered the point of entry by climbing on top of the roof and then climbing down through the hole the thieves had cut.

Following the on-site investigation, Mr. Crowley began what he described as "gumshoe investigations." Under the direction of Mr. Seifer, Mr. Crowley began to interview a number of witnesses, including individuals working for the drug company, for the alarm company, and burglary experts in the area. Mr. Crowley found that the company monitoring the security system, 3M Alarm Service, had failed to respond to a signal representing circuit line difficulties. As a result, Mr. Crowley considered the employees of the alarm service to be the first suspects.

A number of suspects were developed as a result of Mr. Crowley's investigations. In December of 1976, the investigation focused on a property upon which two vehicles and a U-Haul truck were parked. Along with others, Mr. Crowley conducted surveillance to ensure that the vehicles did not leave the property. Subsequently, an individual identified as Mr. Touresco, attempted to drive away from the property and was stopped by state police officers who were surveilling the property at the time. Mr. Touresco was taken to the Northampton State Police Barracks where he was detained, but not arrested. Mr. Crowley read Mr. Touresco his Miranda rights, was responsible for keeping him detained, and interrogated Mr. Touresco for about four hours.

Ultimately, an informant developed by a Special Agent led the investigation to a garage in Coventry, Rhode Island owned by a Mr. Koval, where a majority of the drugs were recovered. Mr. Crowley was present at the seizure. Mr. Crowley testified in front of the Grand Jury in Rhode Island concerning the burglary and the identification of the drugs at issue. Mr. Koval, who had ties to organized crime, was sentenced to five years in prison. Mr. Crowley testified that he worked long hours during the Wyeth Laboratories investigation. In addition, Mr. Crowley had frequent contact with criminal suspects, such as burglary experts, the employees for the alarm company, and Mr. Touresco.

In 1978, Mr. Crowley uncovered what Edward Drinan described as "the largest diversion case of legitimate controlled pharmaceuticals in the history of Maine." Acting on a tip from a drug company, Mr. Crowley discovered that Clukey Pharmacy in Bethel, Maine was ordering unusually large amounts of stimulants. Consequently, Mr. Crowley conducted an administrative inspection of the pharmacy. Before presenting the administrative inspection warrant, however, Mr. Crowley spoke with Bob Stearns, the Chief of Police in Bethel, Maine. Mr. Stearns told Mr. Crowley that the owner of Clukey Pharmacy, Harold Clukey, was extremely dangerous and was the most prominent criminal suspect in the area. Thus, upon serving Mr. Clukey with the administrative inspection warrant, Mr. Crowley asked Mr. Clukey if he was carrying a weapon. Mr. Clukey responded that he was, and produced two or three rifles. Mr. Crowley secured the rifles in a separate area during the on-site investigation. Subsequently, Mr. Crowley, accompanied by Deputy Sheriff Deborah Conroy and Diversion Investigator Walter Houghton, interviewed Mr. Clukey and performed the inspection.

Information developed during Mr. Crowley's investigation indicated that Mr. Clukey was smuggling pharmaceuticals to Florida in his private airplane and returning with loads of marijuana and cocaine. Mr. Crowley served Grand Jury subpoenas to Mr. Clukey and several people working in his establishment. Mr. Clukey was indicted and plead guilty to unlawful distribution of a controlled substance and was sentenced to one year in prison, a five year special parole term and a $ 3,000.00 fine. Subsequently, Mr. Crowley brought his information to the State Medicaid Fraud Unit. As a result, Mr. Clukey was prosecuted in Maine by the state authorities for Medicaid Fraud and received a sentence of two years in prison.

Finally, Mr. Crowley testified regarding an investigation that he began while a Diversion Investigator and continued as

a Group Supervisor: Manny's Apothecary. The investigation began with Mr. Crowley focusing on a psychiatrist located in Brookline, Massachusetts, Dr. Daniel Zoll, who Mr. Crowley suspected of writing prescriptions without a valid medical reason. The prescriptions included narcotics, at a time when psychiatrists could not write prescriptions for drug addiction. Mr. Crowley also became suspicious of the pharmacist who was filling the prescriptions, Emanuel "Manny" Rosengard. According to Mr. Crowley, his investigation indicated that Mr. Rosengard was charging "unbelievable high, high rates," up to four or five hundred dollars per prescription. In addition, Mr. Rosengard would only fill prescriptions late in the day, from 4:00 to 6:00 p.m. Mr. Rosengard had a lookout posted at the front of the pharmacy. Finally, Mr. Crowley suspected that Mr. Rosengard was forging prescriptions as well as filling Dr. Zoll's improper prescriptions.

Mr. Rosengard's pharmacy, Manny's Apothecary, was located in South Boston in an organized crime area. Mr. Crowley testified that "every establishment there had some kind of lookout up front, whether it was a liquor establishment or, the ones that were suspected of doing illegal activity. That included this particular drugstore." Dennis Johnson, the supervisor of the Boston diversion unit at the time of the investigation, testified that "the ability to get in there [South Boston] and do an investigation without becoming, having the defendant become aware of it was very, very difficult. Very difficult." Because it was so difficult for a law enforcement officer to safely enter the store, Mr. Crowley developed an informant and controlled her along with Special Agent William Powers. Mr. Crowley had the informant perform undercover buys at the pharmacy. In addition, Mr. Crowley performed surveillance of the store with Special Agents. According to Mr. Crowley, his surveillance was ineffective because, due to the dangerous neighborhood, he and the special agents were forced to station themselves a block away from the pharmacy. Nor were the undercover buys successful.

Finally, Mr. Crowley performed an administrative inspection with a warrant. As a result, Mr. Crowley found evidence which led to Mr. Rosengard losing his DEA registration.

II. Group Supervisor Duty: 1986-1991

Mr. Crowley was promoted to the position of Diversion Group Supervisor in June of 1986. Subsequently, Mr. Crowley was approached by Jim Carr, a detective in the Suffolk County Organized Crime Unit. Mr. Carr had been involved in a long term investigation concerning cocaine trafficking in South Boston. Evidence collected by Mr. Carr through wire taps led him to Emanuel Rosengard. Mr. Carr approached Mr. Crowley because Mr. Crowley knew Mr. Rosengard and the layout of the building he was using from the earlier investigation of Manny's Apothecary. Mr. Carr acquired and served a criminal search warrant. Mr. Crowley participated in the search.

Mr. Crowley, Mr. Carr and other Boston Police Detectives rehearsed the search at 5:30 in the morning. Mr. Carr served the search warrant midmorning. As Mr. Carr approached the building, Mr. Crowley testified that he was directed by a sergeant of the Boston Police Department to: "'Get in there. What are you waiting for?' You know, as we were approaching. 'Come on. Get right up there.'" Thus, Mr. Crowley walked through the door to the building right along with Mr. Carr. According to Mr. Crowley, Mr. Rosengard had weapons at the location and was disarmed, and the police proceeded with the search. Next, Mr. Crowley and Mr. Carr then sought out an individual, William Cavanaugh, who was one of Mr. Carr's main targets. Mr. Crowley led Mr. Carr downstairs, which was comprised of five or six interwoven rooms with common areas. As Mr. Crowley and Mr. Carr entered one of the side rooms, they literally ran into Mr. Cavanaugh. Mr. Carr announced that they were the police, and Mr. Cavanaugh resisted. Mr. Carr wrestled with Mr. Cavanaugh and forced him to the ground. Mr. Cavanaugh was placed under arrest.

Mr. Crowley indicated that Mr. Cavanaugh was on his way to do his daily cocaine dealing and he had a large amount of Valium on him. According to Mr. Crowley, "they used to deal the two substances together, the cocaine and the Valium tablets. The Valium would, would be to help the addict come down or something afterwards."

The search of Manny's Apothecary found four kilos of cocaine and 65,000 blue Valium tablets. The authorities also found laboratory equipment, one hundred marijuana plants and five or six handguns. Mr. Crowley testified that throughout the investigation, he had contact with criminal suspects, including Mr. Rosengard, Mr. Cavanaugh and the patients/drug addicts. In addition, Mr. Crowley testified that he worked long hours on the case and that he was on call to Mr. Carr and the prosecutor.

The Diversion Investigators who worked for Mr. Crowley while he was a Group Supervisor also worked on criminal investigations. Edward Sullivan was a Diversion Investigator in the Boston regional office of the DEA while Mr. Crowley was a Group Supervisor. In 1987, Mr. Sullivan began investigating a Dr. Robert Carson for violations of the Controlled Substances Act. Through a routine pharmacy survey, the Diversion Investigation Unit of the Massachusetts Police Department had discovered that Dr. Carson had been prescribing over 21,000 dosage units of Oxycodone and Hydromorphine to a married couple, Joyce and John Lori, who had been filing the prescriptions at numerous pharmacies in Massachusetts. Dr. Carson also had been mailing prescriptions to the Loris for no apparent medical purpose.

Mr. Sullivan teamed up with Trooper Peter Silva from the Massachusetts State Police and began to investigate the different pharmacies that were filling prescriptions from Dr. Carson. They found that three individuals, John and Joyce Lori and Thomas West, were receiving large quantities of prescriptions from a number of pharmacies. Mr. Sullivan and

Mr. Silva ultimately found that the prescriptions were being filled in numerous states: New York, New Jersey, Rhode Island and Massachusetts.

Upon discovering the broad, interstate scope of the criminal activity, Mr. Sullivan and Mr. Silva proposed that their investigation be classified as an Organized Crime Drug Enforcement Task Force (OCDETF). According to Mr. Sullivan, an OCDETF brings a number of different agencies under one directive to enforce the drug laws. The different agencies included the Customs Service, the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Internal Revenue Service and the DEA. The proposal was approved.

Mr. Sullivan and Mr. Silva began interviewing the different suspects, including Dr. Carson, Joyce Lori and John Lori. Mrs. Lori told Mr. Sullivan that her husband had developed a heroin addiction while in Viet Nam and sold his pharmaceuticals at area bars to fund his heroin addiction. Mrs. Lori was afraid of her husband, whom she described as a big, very violent individual. Mr. Lori had threatened to kill his wife, who was estranged at the time, if she talked and, therefore, Mrs. Lori was placed in protective custody by the DEA. In the course of his investigation, Mr. Sullivan also interviewed a number of persons with associations to motorcycle gangs who were involved with "hard" drugs such as heroin, cocaine and LSD. Mr. Silva arrested Mr. Lori and Mr. West with Mr. Sullivan present.

Eventually, five persons, including Dr. Carson, Mr. Lori and Mr. West were indicted for conspiring to distribute large quantities of narcotics. Mr. Sullivan testified before the Grand Jury investigation. Ultimately, all six were convicted for conspiracy to violate the Controlled Substance Act and unlawful distribution of Schedule II narcotics.

During his investigation of Dr. Carson, Mr. Sullivan worked long hours. In addition, Mr. Sullivan was required to issue Miranda rights to a number of individuals. Mr. Sullivan Mirandized people using DEA Form 13-A, a form that Mr. Crowley had given him when he began at the DEA. Finally, Mr. Sullivan testified that he was on call during his investigation of Dr. Carson, "because of the fact that at any, any time or any moment, that confidential informant [Joyce Lori] would contact Peter Silva, he, in turn, would contact me . . . on occasion, with her, she felt as though her [life] was being threatened . . . ."

The testimony at trial discussed another OCDETF investigation, during 1987 and 1988, supervised by Mr. Crowley, which focused on the Cumberland Prescription Center of Rhode Island. A newspaper article had reported that, using an informant, Cumberland Police Detectives had discovered that the owner of the Cumberland Prescription Center, Michael Arouth, was dispensing drugs for sexual favors. The Cumberland police performed a search of the establishment and discovered boxes with markings on them that led Mr. Crowley to believe that the boxes had been surrendered to the state for destruction yet somehow ended up in the pharmacy.

The case was further developed by Diversion Investigator Janet Gardner and Special Agent Joseph Crowe. Mr. Crowley supervised Ms. Gardner during the investigation. According to Mr. Crowe, who testified at the trial, Ms. Gardner was the lead investigator and he assisted her because he knew the police officers involved in the investigation and because he had a good relationship with the United States Attorney's office in Providence, Rhode Island. Ms. Gardner took control of all of the evidence from the Cumberland Police Department.

Ms. Gardner and Mr. Crowe used a number of investigatory techniques in performing what Mr. Crowley described as "old gumshoe investigation." First, Ms. Gardner performed an administrative search on the premises, which was followed

by a criminal search warrant. Mr. Crowe procured the search warrant and went with Ms. Gardner and Cumberland Police Officers to execute and perform the search. Mr. Crowe and two uniformed police officers executed the warrant, meaning that they told Mr. Arouth that they had a search warrant and that they were going to search the premises, while Ms. Gardner waited behind. According to Mr. Crowe, Ms. Gardner did not join in executing the warrant because she was unarmed. Ms. Gardner, however, actually performed the search. In addition to administering search warrants, Ms. Gardner and Mr. Crowe also performed drive-by surveillance on suspects' homes. Finally, Ms. Gardner and Mr. Crowe interviewed three inspectors from the Rhode Island Drug Control Unit whom they suspected of providing narcotics to Mr. Arouth.

Ms. Gardner's investigation uncovered a conspiracy consisting of two source points and the key distributor, Mr. Arouth. One source consisted of three pharmacy inspectors, one narcotics inspector and one administrative clerk employed by the Rhode Island Department of Health, Diversion of Drug Control. This group was supplying Mr. Arouth with Percodan, Dilaudid and other prescription drugs surrendered by hospitals and nursing homes to the RIDH/DDC for destruction, which the group than stole. The second source for Mr. Arouth was a group of employees of the United Parcel Service (UPS). This group would steal drugs from the UPS delivery system.

Ultimately, a number of individuals were sentenced to prison for their role in the Cumberland Prescription Center conspiracy. Mr. Arouth pled guilty to five counts involving the possession with intent to distribute controlled substances and record keeping violations. He was sentenced to three years in prison. Richard P. Ferucci, a former Rhode Island Pharmacy Inspector, plead guilty to five counts of possession with intent to distribute controlled substances, conspiracy and tax evasion and was sentenced to five years in prison. In

addition, John J. Barry, a retired Rhode Island Pharmacy Inspector, plead guilty to conspiracy to distribute Valium and filing false income tax returns. He was sentenced to six months in prison. Robert Johnson, a UPS manager, plead guilty to conspiracy to distribute Percodan and Dilaudid and distribution. He was sentenced to one year in prison.

Mr. Crowe testified that Ms. Gardner often worked ten to twelve hour days on the Cumberland case. In addition, Ms. Gardner was on call throughout the investigation of the case. Mr. Crowley stated that there was "extra" danger involved in the case because Ms. Gardner was investigating armed agents of a state agency and working along side them at the same time as she was investigating them.

Another example of the type of criminal investigations performed by Diversion Investigators under Mr. Crowley's supervision was provided by Diversion Investigator Edward Harrington. Mr. Harrington testified regarding his investigation of the Frontier Pharmacy in South Deerfield, Massachusetts, during 1987 to 1989. Mr. Harrington learned, through informants and cooperative sources, that the pharmacist of the Frontier Pharmacy, William Rotkiewicz was selling drugs to area drug addicts. Initially, Mr. Harrington used an informant to buy drugs from Mr. Rotkiewicz using an obviously forged prescription. Mr. Harrington also suspected that the drugs from the Frontier Pharmacy were being sold at a bar in Vermont. Therefore, Mr. Harrington tried to use cooperating sources to make buys from suspects at the bar and the physician. Mr. Harrington testified that he gave detailed instructions to the informant before he went in to see the physician:

> We, you know, we, basically, told him, when he entered the pharmacy, he had to do it in a certain way. He just couldn't go in with a prescription that looked real. So, basically, we had to write up the prescription not putting a full DEA number on there, making all sorts of obvious

> mistakes that any pharmacist would realize was a false prescription. We had to tell him how to talk to the pharmacist almost admitting this is a false prescription, and, so, the pharmacist is fully aware that he's giving someone drugs illegally.

Mr. Harrington was similarly explicit with the informant who was making drug buys from suspects at the bar in Vermont. Mr. Harrington told the informant to be sure to buy certain types of pills, such as Dilaudid or Percodan. They did not want him to go in and buy marijuana or cocaine.

Mr. Harrington monitored the buys from the pharmacy from the outside. On a couple of occasions, Mr. Harrington monitored the buys made inside the bar by going into the bar to witness the transaction. After the informant completed the buys, Mr. Harrington would debrief him and take possession of any evidence.

The buys from the informants, however, were not successful in the Frontier Pharmacy case. Therefore, Mr. Harrington entered the pharmacy with a notice of inspection, performed an accounting of the pills the pharmacy had received compared to what was distributed, and also discovered a box of 248 apparently forged prescriptions which bore the signature of a doctor who was deceased. In addition to the accounting and search, Mr. Harrington also interviewed Mr. Rotkiewicz, who was suspected of violating the criminal laws of the United States at the time.

To investigate the legitimacy of the prescriptions that were found at the Frontier Pharmacy, Mr. Harrington interviewed approximately one hundred people who were named on the prescriptions. The process of interviewing these people took approximately a year and often required Mr. Harrington to travel to central Massachusetts from Boston. Some of the persons Mr. Harrington interviewed were elderly. Others, however, were "junkies" who lived in bad neighborhoods. Mr. Harrington testified that he was placed in hazardous situations

when he was interviewing persons in those neighborhoods, and high crime areas. During the investigation, at the beginning of the week, Mr. Harrington would drive to Springfield and stay in a hotel, which served as a base of operations. While he was investigating the legitimacy of the prescriptions, Mr. Harrington would return to Springfield between 9:00 and 11:00 at night.

After finishing the investigation of the prescriptions, Mr. Harrington and the Assistant United States Attorney selected the best witnesses from the one hundred interviewed and presented them to a Grand Jury. At the Grand Jury, the prosecution presented a handwriting analysis of the prescriptions which showed that Mr. Rotkiewicz had forged almost all of the prescriptions himself. As a result, Mr. Rotkiewicz's DEA registration number was revoked.

After the DEA revoked Mr. Rotkiewicz's registration number, Mr. Harrington received information that he was continuing to order controlled drugs through a distributor in Long Island, New York. Consequently, Mr. Harrington traveled to Long Island to interview an executive from the distributor and learned that Mr. Rotkiewicz's daughter, who was also a pharmacist, had ordered the drugs. Mr. Harrington traveled back to Boston and went to Springfield that night. The following morning, Mr. Harrington wrote up an affidavit for a search warrant. It is not apparent from the record whether the warrant was for an administrative inspection or a criminal search. The following morning, Mr. Harrington served the search warrant.

Mr. Rotkiewicz was eventually charged with falsifying prescriptions and illegally dispensing controlled substances. Mr. Rotkiewicz's daughter was not charged. Mr. Rotkiewicz plead guilty to charges that he falsified ten prescriptions and to a single charge of unauthorized drug distribution. Mr. Rotkiewicz, age 67 at the time, was sentenced to one year of in-home detention and fined $ 40,000.00.

III. Staff Coordinator Duty: 1991-1994

In the fall of 1990, Mr. Crowley received notice that he had been chosen by the Career Board to take up a position at DEA headquarters as a Staff Coordinator. The move was part of a rotation policy by which all supervisors from the field to perform a tour of duty at DEA Headquarters. When Mr. Crowley first arrived at DEA headquarters, he was assigned to the Domestic Drug Investigations Unit within the Drug Operations Section. Mr. Crowley's supervisor was Margaret Brophy. Ms. Brophy defined her duties as the unit chief at trial: "I was a unit chief that exercised oversight over all investigations being conducted by diversion investigators in the field. That could include as simple as a pre-registrant investigation to as complicated as a major criminal investigation." Ms. Brophy described Mr. Crowley's duties in the Domestic Drug Investigations Unit as follows:

> As a staff coordinator, he would have been responsible for a certain number of divisions, and that means he would be monitoring and coordinating their investigations; he would be available to support them in funding and deciding whether a case should be part of a special enforcement program; he would be available to give them advice and guidance; he would review cases and decide if they were going in the right direction or is there a better way, maybe, we can do this. Duties of that nature.

As a Staff Coordinator, Mr. Crowley gave advice to Diversion Group Supervisors, and on occasion, Special Agent Group Supervisors and Special Agent Investigators. Ms. Brophy also testified regarding the practical requisites for Mr. Crowley's position:

> Q . . . Do you think that the job that you just described that Mr. Crowley was performing for you, do you think that position could have performed if he had not had criminal investigative experience?

A. No, it could not.

Q. Okay. Would you consider it to be a mandatory prerequisite for the job?

A. Yes.

Q. Let me know, Ms. Brophy, was it important to you, in having Mr. Crowley in your unit, whether or not he had served a warrant, a search warrant, for example?

A. It made the difference, in my opinion. You can't give advice if you haven't done it.

Q. If you haven't done it. Okay. Did it make any difference to you as to whether he had frequent and direct contact with criminals?

A. It made a difference. Again, he's giving advice to people in the field, and you want the investigator to give competent advice.

Q. And did it make a difference to you, in the work that Mr. Crowley did, as to whether he interrogated witnesses and suspects?

A. Yes.

* * *

Q. Okay. Would it have been important to you that Mr. Crowley had given Miranda warnings, for example, in the field?

A. Yes.

Q. Why would that have been important?

A. Because you might have him giving advice to a relatively inexperienced field investigator on how to approach a particular instance, and he should have had that experience himself.

Q. How about experience with, say, undercover buys?

A. He should have been an expert on how you do an undercover buy from a registrant. You have to be very, very careful that you don't make an undercover buy where you're giving, say, a doctor a medical reason for selling you a prescription, and in the field, the diversion investigator is considered the expert, and the agent, in those instances, will discuss different scenarios with the investigator.

Q. Well, would it have been important to Mr. Crowley's position that he have experience in, with participating in searches?

A. Yes, it would.

Q. Why would that be important?

A. To know what type of evidence is germane to the type of case that you're hoping to have prosecuted, to have had the experience to know exactly what was involved, to know how to handle various types of evidence, including seizures, for instance, of PCs or personal computer records and—I think that's valid experience.

In the fall of 1991, a new unit, the International Drug Unit, was formed within the Drug Operations Section of the DEA. Larry Snyder, the chief of the new unit, selected Mr. Crowley from a group of Staff Coordinators to work in the new unit. Mr. Crowley began working as a Staff Coordinator in the International Drug Unit on October 1, 1991. According to Mr. Snyder, Mr. Crowley "coordinated criminal investigations that were ongoing in the International Drug Unit." Mr. Snyder testified that Mr. Crowley's background in criminal investigations was the "primary factor" in his decision to select Mr. Crowley for the International Drug Unit. Mr. Snyder testified that experience in criminal investigations was a mandatory prerequisite for the position because, "the International Unit did not do any type of inspections or regulatory work. We

only worked with drugs that were being smuggled in the United States, and you had to have a knowledge of criminal investigations to be able to coordinate other people who were conducting criminal investigations."

IV. Diversion Group Supervisor Duty: 1994-2001

Mr. Crowley left DEA headquarters and returned to the DEA's Boston, Massachusetts regional office as a Group Supervisor on October 31, 1994. Similar to his prior experience as a Group Supervisor, from June of 1986 until February of 1991, Mr. Crowley supervised Diversion Investigators who were investigating criminals. JoAnn Masar, a Diversion Investigator who worked under Mr. Crowley briefly in 1991, and then again from 1994 until the end of March, 2001, testified that, other than two to four cyclic inspections a year, her time was devoted to criminal investigations. Ms. Masar testified regarding the High Street Gang case, an investigation that began in the fall of 1999, while Mr. Crowley was her group supervisor, and was ongoing at the time of trial. The High Street Gang case was initiated after a person died from an overdose of cocaine and OxyContin, a Schedule II narcotic. Ms. Masar investigated an organization that was purchasing OxyContin and distributing it throughout southern Maine and New Hampshire. The organization was washing prescriptions with acetone to take the writing off and then rewriting the prescriptions themselves.

The High Street Gang investigation was a joint investigation with the Department of Health and Human Services, the Maine Drug Enforcement Agency, the Biddeford Police Department and, to a lesser degree, the Sanford Police Department. Ms. Masar testified that "as far as DEA was concerned, I was the case investigator." Ms. Masar testified that the investigation began "with pharmacy records to see who was getting the OxyContin, and then we would go out and interview those people. All of those people had prior records of, of drug offenses or they were known to the local

departments as being involved in drug activity." In addition to interviews, Ms. Masar used undercover buys to investigate the High Street Gang case. "We, DEA supplied the money, which was me, paid the person who was making the buy, whether it was a police officer or an informant, and organized the buy with whoever was handling the informant." Ms. Masar also used confidential informants in the case. Due to a change in DEA policy, Ms. Masar was authorized to register informants, meaning she could recruit, pay and control the informants. Most of the informants that Ms. Masar used were suspected of having committed a federal crime. Finally, Ms. Masar used surveillance during the High Street Gang case. According to Ms. Masar, "some of the surveillance was in conjunction with the buy that was being done. It was a moving and stationary surveillance. It kind of changed in midstream, and I was in a vehicle with another, with a police officer."

During the High Street Gang investigation, Ms. Masar also assisted in making arrests and presenting information to the Grand Jury. Ms. Masar testified:

> When we were effecting arrests, we did it early in the morning. A lot of times, it was around 5:00 in the morning. When we were getting ready for Grand Jury, because it was an ongoing process, we started Grand Jury in the beginning of last year and haven't stopped yet. Every couple of weeks, we indict more people.

Ms. Masar also testified about a case known as Operation Ox. The case began with a rash of pharmacy burglaries which appeared to be linked. A number of states were involved in the investigation: Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Ohio and New Hampshire. The information collected by Ms. Masar indicated that a group of people in Lynn, Massachusetts were involved in the burglaries. Ms. Masar testified that "some of those drugs would, would be paid to the Hell's Angels Motorcycle Gang

for, it's called 'tribute.' For tribute for doing business in their town; so that these burglars could sell their drugs, and the rest of the drugs were going on the street."

The break in the case came when Ms. Masar was informed by a local police officer of a tip he received from a person who had been involved with a number of break-ins in the area. The informant was able to identify the individuals involved in the pharmacy burglaries from a security video tape taken during one of the break-ins in Rhode Island. The Rhode Island state authorities acquired search and arrest warrants, arrested the individuals, and incarcerated them. One of the defendants cooperated with Ms. Masar, and gave her additional information, which, when combined with the information she had already collected, lead her to a number of other targets. Ms. Masar testified with regard to the arrest of two of the suspects:

> We also had another video tape of one of the burglaries, and we identified the person in that tape as being one of our suspects. We obtained a search warrant—it was a state search warrant—and an arrest warrant for those two individuals. We coordinated with New York, the local department. They came out, and we arrested the two individuals and conducted the searches of their residences.

Ms. Masar was the affiant for the search warrant, and physically conducted the search. Ms. Masar testified as to the general procedure she uses when conducting a search:

> I organize whoever I'm working with on a particular case. I organize them, give everybody jobs to do at the scene of the search, tell them what we need to locate. Have them, they have a copy of the affidavit so they can see what it is we're looking for. We go to the location, a warrant is handed to a law enforcement person to actually hand over, and they go in and secure the building, and then we conduct the search.

Ms. Masar testified that there were dangerous aspects to the investigation given that one of the main targets in the pharmacy burglaries was an enforcer for the Hell's Angels Motorcycle Gang who was on probation for assault. Ms. Masar arranged for this suspect's arrest with his probation officer and, while she did not actually arrest him, she was present at the time. Ms. Masar also interrogated the suspect for a long period of time following the arrest. Furthermore, Ms. Masar testified that she worked long hours on Operation Ox and that she was on call twenty-four hours a day, due to the nature of the burglaries, which often occurred at night and during storms.

On April 1, 2001, Mr. Crowley was redesignated as a "Special Assistant." Mr. Crowley's duties as a "Special Assistant" were not discussed at trial.

V. Mr. Crowley's Administrative Appeals

The Office of Personnel Management (OPM) has credited Mr. Crowley with primary Law Enforcement Officer coverage under 5 U.S.C. § 8331(20) from June 15, 1974 to June 15, 1986, secondary supervisory credit from June 16, 1986 to February 24, 1991, and secondary administrative credit from February 25, 1991 to September 30, 1991. This period includes Mr. Crowley's time as a Diversion Investigator, as a Diversion Investigator Group Supervisor and his time as a Staff Coordinator at the Domestic Drug Investigations Unit within the Drug Operations Section at DEA headquarters. By letter dated September 22, 1992, Mr. Crowley requested Law Enforcement Officer retirement coverage from October 1, 1991 to September 30, 1992. A year later, the government had not acted on Mr. Crowley's request for retirement coverage. By letter dated September 23, 1993, Mr. Crowley expanded his request for retirement coverage to include October 1, 1992 to September 30, 1993. In December 1993, the responsibility for determining creditable service was transferred from OPM to the relevant employing agency. In Mr. Crow-

ley's case, the Justice Management Division (JMD), a division of the DOJ, acquired the responsibility for credit determinations. Also in 1993, the Merit Systems Protection Board, the Board responsible for reviewing JMD's decisions, adopted what it defined as a "significantly narrower" standard for defining Law Enforcement Officer credit. *See Bingaman v. Dep't of Treasury*, 127 F.3d 1431, 1438 (Fed. Cir. 1997). The Board established a six part test for determining whether an employee meets the definition of achieving Law Enforcement Officer status for purposes of entitlement to Law Enforcement Officer retirement credit. *See Hobbs v. OPM*, 58 M.S.P.R. 628, 633 n.5 (1993). The MSPB published a number of subsequent decisions utilizing the narrower approach to determine eligibility for Law Enforcement Officer retirement credit. *See, e.g., Bremby v. Dep't of the Navy*, 81 M.S.P.R. 450, 453 (1999); *Taylor v. Dep't of Treasury*, 68 M.S.P.R. 693, 696 (1995), 106 F.3d 427 (Fed. Cir. 1997); *Ferrier v. OPM*, 66 M.S.P.R. 241, 244 (1995); *Peek v. OPM*, 63 M.S.P.R. 430, 432 (1994); aff'd 59 F.3d 181 (Fed. Cir. 1995) (table); *Sauser v. OPM*, 59 M.S.P.R. 489, 492 (1993). In *Bingaman v. Department of Treasury*, the United States Court of Appeals for the Federal Circuit affirmed the MSPB's adoption of the narrower standard, noting that "the set of factors the [MSPB] has developed captures the essence of what Congress intended." *Bingaman v. Dep't of Treasury*, 127 F.3d at 1436, 1438.

Following 1993, Mr. Crowley expanded his request to include each subsequent year. In a memorandum dated August 19, 1994, Jean D. Mathis, the Deputy Assistant Administrator for Personnel at the time, advised Stephen R. Colgate, the Assistant Attorney General for Administration, that Mr. Crowley's position as Staff Coordinator "has been determined by OPM to meet the law enforcement criteria; that is, it is an administrative position for which primary law enforcement experience is the prerequisite. Therefore, continued law enforcement coverage in the secondary category is recom-

mended for DI Crowley." On July 9, 1999, Retha Fulmore, the Deputy Assistant Administrator for Personnel at the time, reversed the decision from OPM and advised that Mr. Crowley's position as a Staff Coordinator was not approved for Law Enforcement Officer credit. On August 16, 1999, JMD issued a final decision denying Mr. Crowley's requests for Law Enforcement Officer credit from October 1, 1991 through June 15, 1997.

Mr. Crowley did not receive overtime pay from 1974 to April of 1995. Mr. Crowley testified that he did not record the amount of overtime he was working because:

> The overtime budget for the rest of the employees [below GS-10] was very, very small, and if I, if I wrote down the hours for overtime, I wouldn't be paid anyways. So, it was, it was discouraged. I was told not to do it, and the same would hold true for compensatory time. There was, I was told there was no such thing.

In April of 1995, Mr. Crowley began receiving a limited amount of overtime, five hours of overtime pay a week, ten hours a pay period. Mr. Crowley testified, however, that he "worked a lot more than 10 hours per pay period overtime, but since I was used to doing that for so many years, I, I didn't, I didn't claim, you know, anything over and above what I could get under the system that we setup." Ms. Fulmore testified that within DEA, only Special Agents received AUO "because it has been determined that the nature of their work is uncontrollable. We cannot control when they will be required to work, and they receive AUO." Mr. Crowley, however, testified that "because of the nature of the investigations and the work that had to be done," the overtime he worked was uncontrollable. Diversion Investigators have never received availability pay.

Plaintiff currently seeks Law Enforcement Officer credit in the secondary administrative category from October 1, 1991

to October 30, 1994 and Law Enforcement Officer credit in the secondary supervisory category from October 31, 1994 to October 1, 2001. According to the briefs submitted by the plaintiff on the pre-trial motion, plaintiff argues that OPM's previous decision granting Mr. Crowley primary credit is sufficient to satisfy plaintiff's burden of demonstrating, for purposes of obtaining secondary Law Enforcement Officer credit, that he previously occupied a primary Law Enforcement Officer position. In support of Mr. Crowley's claim for Law Enforcement Officer credit, the plaintiff argues that "Mr. Crowley satisfies the condition in 5 U.S.C. § 8331(20) [(2000)] in that he was a law enforcement officer in a primary position as a Diversion Investigator in the Boston Diversion regional office from June 15, 1974 to June 15, 1986 and the duties of his position were primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." In addition, the plaintiff contends that if OPM's previous decision granting Mr. Crowley primary credit is not given preclusive effect, the plaintiff still meets the new standard as expressed by the United States Court of Appeals for the Federal Circuit. Finally, plaintiff argues that because Mr. Crowley meets the definition of a "Law Enforcement Officer" under 5 U.S.C. § 8331 (20), Mr. Crowley is entitled to the benefits which flow from Law Enforcement Officer status, including enhanced rates of pay pursuant to FLEPRA §§ 403 and 404. In addition, Mr. Crowley seeks overtime pay under 5 U.S.C. § 5542(a)(4), AUO pay under 5 U.S.C. § 5545(c)(2) from August 2, 1985[14] to October 1, 2001, and availability pay under 5 U.S.C. § 5545a from 1994 to October 1, 2001.

In response, defendant argues that "Mr. Crowley is neither entitled to LEO credit nor to FLEPRA benefits." Regarding the plaintiff's claims for pay in excess of the forty hour work week, defendant contends that the plaintiff is not entitled to

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[14] *See* supra n.6.

overtime pay pursuant to 5 U.S.C. § 5542(a)(4) (2000), AUO under 5 U.S.C. § 5545(c)(2), or availability pay pursuant to 5 U.S.C. § 5545a.

DISCUSSION

As an initial matter, the court considers the issue raised by the parties' briefs submitted prior to trial. The parties jointly stipulated to the issue regarding what the plaintiff must prove to meet the transfer requirement of 5 C.F.R. § 831.904 (2001) as follows:

> whether the previous decision of the Office of Personnel Management to grant plaintiffs primary law enforcement officer credit is sufficient to satisfy plaintiffs' burden of demonstrating, for purposes of obtaining secondary law enforcement officer credit, that they previously occupied a primary law enforcement officer position or whether plaintiffs must demonstrate, through evidence of their primary job activities, that the primary position they occupied was a law enforcement officer position.

The parties each have raised several arguments to resolve this issue.

I. TRANSFER REQUIREMENT

The defendant argues that:

> the plain language in 5 C.F.R. § 831.904(a)(1), (2) (2001) requires, for entitlement to secondary coverage, that an employee have transferred into the secondary position from a primary LEO position (the transfer requirement). Thus, it is necessary to consider whether [Mr. Crowley was] in [a] primary LEO position[], and, under *Bingaman*,[15] this inquiry must be made using the current legal

[15] Now also under *Watson v. Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1083, 151 L. Ed. 2d 700, 122 S. Ct. 817 (2002), decided August 17, 2001, and *Hall v. Department of the Treasury*, 264 F.3d 1050 (Fed. Cir. 2001), decided September 4, 2001.

> standard without regard to an earlier determination made under a previous standard. In short, OPM's decision to grant primary LEO credit to these individuals was based upon a legal standard that is no longer current, and that decision is not tantamount to a finding that they were primary LEOs under current law, which *Bingaman* requires.

(emphasis in original).

In contrast, the plaintiff argues that:

> The issue of primary time is not open on direct review. OPM long ago determined that the plaintiffs, Buckley and Crowley, had demonstrated that their duties in their primary positions were those of law enforcement officers. The plaintiffs should not be required to make that demonstration again under a standard that was not applicable at the time the decision was made . . .
>
> On this basis the OPM decision may not be relitigated.

In the controlling statute, a Law Enforcement Officer is defined as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position." 5 U.S.C. § 8331(20) (2000). Pursuant to 5 U.S.C. § 8347, OPM has issued regulations providing guidelines for determining entitlement to Law Enforcement Officer credit. *See* 5 C.F.R. §§ 831.901-831.914 (2002). The regulations at 5 C.F.R. § 831.904(a)(1) establish the transfer requirement for secondary credit eligibility as follows: "Employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position . . . ." 5 C.F.R. § 831.904(a)(1). Thus, despite the fact that the plaintiff seeks only secondary credit, the conditions

for earning secondary credit include a determination regarding whether the employee occupied a primary position.

Upon review of the plain language of the regulation, it is unclear whether the transfer requirement of § 831.904(a)(1) (2002) must be met each time an employee submits an application for Law Enforcement Officer credit to OPM, even if the employee has previously been deemed to have met the transfer requirement in prior determinations regarding eligibility for Law Enforcement Officer credit. Plaintiff argues that:

> once Mr. Crowley was credited with having transferred to a supervisory position as defined by 5 C.F.R. § 831.903(c)(3)(i) (1986), he should have been "deemed to have met the transfer requirements for all subsequent employment in supervisory/administrative law enforcement positions" pursuant to 5 C.F.R. § 831.903(d) (1986). The Court must therefore find that Mr. Crowley's service subsequent to 1986 is covered as a law enforcement officer pursuant to 5 C.F.R. § 831.903(c)(3)(i) (1986).

In response, defendant argues that:

> The provision Mr. Crowley relies upon, 5 C.F.R. § 831.903(d), was last in effect in 1987 and therefore was never in effect at any time Mr. Crowley occupied the positions for which he currently seeks LEO credit (Mr. Crowley began his employment as Staff Coordinator of the International Drug Unit in October 1991). Accordingly, former 5 C.F.R. § 831.903(d) at no time applied to Mr. Crowley's pending LEO claims, and there is no issue concerning applicability of retroactive regulations.

(Emphasis in original.) A review of the history of the regulation at issue shows that a previous determination that the employee has met the transfer requirement does not preclude

the subsequent review of the transfer requirement for later applications. The version of 5 C.F.R. § 831.903(c)-(d) in effect from 1981 until 1987 provides:

> (c) "Law enforcement officer" also includes an employee who is transferred to a position the primary duties of which are not the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States, . . . if—
>
> (1) Service in the position transferred to follows service in a law enforcement position without—
>
> (i) A break in service of more than three days; or
>
> (ii) Intervening employment that was not as a law enforcement officer;
>
> (2) The duties of the position transferred to are in the law enforcement line of work in an organization with responsibility for the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States; and
>
> (3) The position transferred to is --
>
> (i) Supervisory—one which requires a duty of supervising subordinate employees who are directly engaged in the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States; or
>
> (ii) Administrative—one which includes an executive or managerial position and may include a clerical, technical, semiprofessional, or professional position of a type also found in organizations with no law enforcement responsibilities: Provided, That experience as a law enforcement officer is a basic qualification for the administrative position.

> (d) A law enforcement officer, as defined in section 8331(20) of title 5, United States Code, who has transferred to a position identified by paragraph (c) of this section [which defines supervisory and administrative positions], under the conditions described in this paragraph, shall be deemed to have met the transfer requirements for all subsequent employment in supervisory/ administrative law enforcement positions, except for any period of reemployment as an annuitant under title 5, United States Code, section 8335(b) or section 8336(c).

See, e.g., 5. C.F.R. § 831.903 (c)-(d) (1987). The applicable regulations issued after 1987 to the present do not contain the same transfer provisions or the provision which waives consideration of the transfer requirement when reviewing future applications for secondary credit if the employee has already met the transfer requirement.

The United States Supreme Court, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988), discussed the time period during which regulations should be given effect. The Bowen Court stated: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 209. However, an earlier case issued by the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974). The United States Court of Appeals for the Federal Circuit has considered the apparent inconsistency between Bowen and Bradley and decided to follow Bowen, stating that "we prefer the longer-standing rule that retroactivity is not presumed." *Sargisson v. United States*, 913 F.2d 918, 923 (Fed. Cir.) reh'g denied (1990).

Moreover, the United States Supreme Court recently considered whether a statute may be given retroactive effect and, after explicitly citing Bowen, held that "[a] statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 316, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001). The St. Cyr Court also adopted a two-step analysis for determining whether a statute has an impermissible retroactive effect. *Id.* The first step involves ascertaining "whether Congress has directed with the requisite clarity that the law be applied retrospectively. The standard for finding such unambiguous direction is a demanding one." *Id.* (citation omitted). The second step "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Id.* at 321 (quoting *Martin v. Hadix*, 527 U.S. 343, 357-358, 144 L. Ed. 2d 347, 119 S. Ct. 1998 (1999) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994))). Rejecting retroactivity, the St. Cyr Court adopted the principle that "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . .'" 533 U.S. at 316 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990) (Scalia, J., concurring)). The St. Cyr Court pointed out that: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ." *Id.* Although the question presented by Mr. Crowley's employment history is more strictly one of prospectivity, instead of retroactivity, the underlying theories of how to achieve notice to all parties and, therefore, fairness, apply in both situations. The change in 5 C.F.R. § 831.903(d) after the revisions in 1988, so that the regulation no longer waived consideration of the transfer requirement when reviewing future applications for secondary credit if the employee already had met the transfer requirement, suggests

a change in status regarding which provisions both parties had notice and under which provisions their conduct should be judged. Compare 5 C.F.R. § 831.903(c)-(d) (1987) with 5 C.F.R. § 831.904 (1988).

"In determining the meaning of such regulations, rules of interpretation applicable to statutes are appropriate tools of analysis." *Gen. Elec. Co. v. United States*, 221 Ct. Cl. 771, 778, 610 F.2d 730, 734 (1979); accord *Wronke v. Marsh*, 787 F.2d 1569, 1574 (Fed. Cir.) (stating that for the interpretation of regulations, just as in the interpretation of statutes, courts must begin with their plain language), *cert. denied*, 479 U.S. 853, 93 L. Ed. 2d 121, 107 S. Ct. 188 (1986); *see also Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993) (noting that the canon of statutory construction which states that "where the text permits, statutes dealing with similar subjects should be interpreted harmoniously" is "equally applicable" to regulations).

In the present case, neither the regulations at issue nor the authorizing statute discuss the time period during which the regulation will be applicable. In addition, the regulations from 1988 onward may deprive Mr. Crowley of the benefits of being deemed to have met the transfer requirements for the purposes of earning credit for future supervisory or administrative positions. Thus, applying a binding retroactive overlay from regulations issued after 1987 "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *INS v. St. Cyr*, 533 U.S. at 321 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. at 269 (quoting *Soc'y for Prolongation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.))). However, even if the regulations at issue for 1988 to 2002, which do not contain the waiver provision, should not be applied retroactively, the benefits of the 1981 and 1987 regulations, which contain the

provision waiving the consideration of the transfer requirements, would not apply to the present case because the transfer requirements were changed from 1988 forward.

Mr. Crowley's conduct which triggers the legal consequences imposed by the regulations occurs at multiple points in time. Mr. Crowley transferred into a supervisory or an administrative position in 1986 (to group supervisor), in 1991 (to staff coordinator), and in 1994 (to group supervisor) pursuant to the regulations in effect during those periods of time. The times of the transfers are relevant to determine which regulations govern and if these transfers are sufficient for meeting the transfer requirement for all future applications for credit in supervisory or administrative positions. In 1988, the substance of the regulations was significantly revised. The 1988 version of the C.F.R. established and defined "primary positions" and "secondary positions" and set forth a different transfer requirement as follows: "Employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position . . . ." 5 C.F.R. § 831.904(a)(1) (1988).

From 1988 through 2002, the regulations define a "primary position" as "a position whose primary duties are . . . investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." Compare 5 C.F.R. § 831.902 (1988) with 5 C.F.R. § 831.902 (2002). A "secondary position" is defined as a position that:

> (1) Is clearly in the law enforcement or firefighting field;
>
> (2) Is in an organization having a law enforcement or firefighting mission; and
>
> (3) Is either—

> (i) Supervisory; i.e. a position whose primary duties are as a first-level supervisor of law enforcement officers or firefighters in primary positions or
>
> (ii) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a prerequisite.

Compare 5 C.F.R. § 831.902 (1988) with 5 C.F.R. § 831.902 (2002).[16]

Although the provision applicable before 1988, waiving consideration of the transfer requirements for "all subsequent employment in supervisory/administrative law enforcement positions," should apply prospectively once Mr. Crowley had transferred into a supervisory or administrative position, the transfer requirements which were imposed pre-1988, and which could be waived, were changed resulting in a new transfer requirement included in the regulations from 1988 to the present. Compare 5 C.F.R. § 831.903(d) (1987) with 5 C.F.R. 831.904(a)(1) (2002). From 1988 to the present, a different transfer requirement has been established—transfer from a primary position to a secondary position. *See, e.g.*, 5 C.F.R. 831.904(a)(1) (2002). The new definitions of primary and secondary positions result in different transfer requirements. For example, the new definition of a secondary position requires a transfer into a position that "is clearly in the law enforcement or firefighting field" and is "in an organization having a law enforcement or firefighting mission." *See* 5 C.F.R. § 831.902. Moreover, the definition of an administrative secondary position significantly changed in 1988. Because of the changes in the transfer requirement in 1988, any

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[16] Although the numbering system for the sub-parts has been revised a number of times from 1988 until 2000, the substance of the regulations during this time period is identical.

waiver of the previous transfer requirement cannot fulfill the plaintiff's obligation to satisfy the current transfer requirement. The C.F.R. after 1988 has never contained a provision waiving the consideration of this new transfer requirement. Even if the waiver provision in effect from 1981 until 1987 applied to Mr. Crowley's applications for credit during that time period, this waiver provision does not permit Mr. Crowley to escape the current transfer requirement, and Mr. Crowley has the burden to prove that he meets the current transfer requirement, unless specifically grandfathered by statute or regulation.

Thus, the transfer requirement for obtaining secondary credit must include a determination that the employee previously occupied a primary position and had been transferred directly (within three days) from that primary position. Mr. Crowley's applications submitted in 1992 for secondary credit for work starting in 1991 until the present have not been decided and remain open on direct review. Mr. Crowley's occupation of a primary position is a requirement for obtaining secondary credit and interpretations of federal law apply retroactively to all open cases. Therefore, the pertinent statutes and regulations and, if applicable, the factors discussed in recent cases including *Hall v. Department of the Treasury*, 264 F.3d 1050 (Fed. Cir. 2001), *Watson v. Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001) and *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), which offer guidance on how to determine Law Enforcement Officer status, and which are discussed more fully below, are to be considered to determine whether Mr. Crowley was in an Law Enforcement Officer creditable primary position and, therefore, satisfies the transfer requirement for eligibility for secondary credit.

II. JUDICIAL ESTOPPEL

Plaintiff argues that the principle of judicial estoppel should apply to preclude the government from taking the position

that he is not entitled to primary Law Enforcement Officer credit, a position that he alleges is inconsistent with defendant's prior position regarding crediting primary time. Mr. Crowley previously was awarded and received primary Law Enforcement Officer credit from 1974 to 1986 and secondary credit from 1986 to 1991. The United States Court of Appeals for the Federal Circuit has explained the doctrine of judicial estoppel as follows:

> where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed. *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 558, 39 L. Ed. 578 (1895); *Wang Lab., Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355, 358 (Fed. Cir. 1992). Judicial estoppel is designed to prevent the perversion of the judicial process and, as such, is intended to protect the courts rather than the litigants. *See, e.g., Wang Lab., Inc.*, 958 F.2d at 359; In re *Cassidy*, 892 F.2d 637, 641 (7th Cir.), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48, 112 L. Ed. 2d 24 (1990) . . .

Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1565 (Fed. Cir.) reh'g denied, en banc suggestion declined (1996). A party has successfully asserted a position when that party has:

> received a benefit from the previously taken position in the form of judicial success. *See Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579, 224 USPQ 1, 10 (Fed. Cir. 1984) ("In all precedent cited to us and which we have researched independently, the party against whom estoppel is invoked received some benefit from the previously taken position, i.e., he 'won' because of it.") . . .

Water Techs. Corp., v. Calco, Ltd., 850 F.2d 660, 665-66 (Fed. Cir.) *cert. denied* 488 U.S. 968, 102 L. Ed. 2d 534, 109 S. Ct. 498 (1988).

In the present case, the government received no benefit from taking the position that the plaintiff was entitled to primary credit. The DEA and the OPM agreed with the plaintiff's application of the law, and the plaintiff was the one who benefitted from obtaining Law Enforcement Officer coverage. Furthermore, the defendant has not "urged a particular position in a legal proceeding." *Data Gen. Corp. v. Johnson*, 78 F.3d at 1565. The plaintiff applied to the OPM through the DEA for Law Enforcement Officer credit, the DEA reviewed the plaintiff's request and recommended that the plaintiff's request be granted and the OPM determined that the plaintiff met the standard for receiving credit. At no point during this process regarding the plaintiff did the DEA or the OPM assert a position in a legal proceeding. The defendant also has asserted a good faith argument that the change in the legal position of the MSPB, as affirmed by the United States Court of Appeals for the Federal Circuit, supported the same change in position regarding the plaintiff's entitlement to primary Law Enforcement Officer credit. Accordingly, defendant's positions are not inherently contradictory because the change in the interpretation of the law regarding primary time by the MSPB, as affirmed by the Federal Circuit, was the DOJ's justification for adjusting its position at the administrative level. Thus, judicial estoppel does not preclude the defendant from taking the position that the plaintiff did not occupy a primary position under the current standard.

III. COLLATERAL ESTOPPEL

Plaintiff also argues that "collateral estoppel requires that the Department of Justice be held to the decision recommended by the Department and made by OPM to grant plaintiffs primary law enforcement credit." In response, defendant contends that "actual litigation is necessary for the doctrine of collateral estoppel to be applicable" and that "the plaintiffs here received their primary credit without litigation; OPM

voluntarily granted the plaintiffs' application for LEO credit without litigating the matter." (Emphasis in original).

Defendant argues that "the Supreme Court's decision in [*Commissioner v.*] *Sunnen* unequivocally states that collateral estoppel does not apply for future purposes when there has been a change in controlling legal principles." In *Commissioner v. Sunnen*, 333 U.S. 591, 92 L. Ed. 898, 68 S. Ct. 715 (1948), the Court considered whether a 1935 determination of tax liability on royalties from a 1928 license contract would preclude the determination of tax liability on royalties based on the 1928 contract and other contracts, all distributed after a change in the law. In finding that collateral estoppel would not preclude the re-litigation of tax liability on royalties distributed after the change in law, the Court held that "a subsequent modification of the significant facts or a change or development in the controlling legal principles may make [a previous] determination obsolete or erroneous, at least for future purposes." *Id.* at 599. However, the Court also acknowledged that an issue that was essential to the previous judgment and actually determined in the previous proceeding will bind a court in a subsequent proceeding even under a different cause of action. *Id.* at 601. Regarding a change in the facts, the Sunnen Court detailed the situations in which collateral estoppel would not apply:

> If the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result . . .

Id. (footnote omitted). Thus, the Court reasoned that separable facts or instruments or transactions in separable form

would defeat the application of collateral estoppel in a subsequent proceeding.

The defendant relies on the United States Court of Appeals for the Federal Circuit decision in *Bingaman v. Department of Treasury*, 127 F.3d 1431 (Fed. Cir. 1997) in support of its argument that collateral estoppel does not apply in this case. In *Bingaman*, the plaintiff received primary Law Enforcement Officer credit for his services from February 28, 1989 through July 15, 1993. He subsequently filed a request for primary Law Enforcement Officer credit for his services from July 15, 1993 through July 13, 1994. The United States Court of Appeals for the Federal Circuit in *Bingaman v. Department of Treasury* affirmed the MSPB's decision upholding the agency's denial of Bingaman's claim for primary Law Enforcement Officer credit, even though the plaintiff had previously received primary Law Enforcement Officer credit for services performed as a Customs Service employee during an earlier time period. *Id.* at 1436-38. The Bingaman court held that the previous grant of Law Enforcement Officer credit to the plaintiff did not serve to bar the consideration of primary credit during a subsequent time period. *Id.* at 1436-38. In holding that collateral estoppel did not apply, the Bingaman court relied on an exception to the collateral estoppel principle which arises when "there has been a change in the applicable law between the time of the original decision and the subsequent litigation in which collateral estoppel is invoked." *Id.* at 1437. Referring to changes in MSPB case law, the Bingaman court wrote that "there has been a sufficient change in the 'legal atmosphere' with respect to the issue of LEO retirement credit that the bar of collateral estoppel should not be applied in this case." *Id.* at 1438.

"The doctrine of collateral estoppel, or issue preclusion, serves to bar the revisiting of issues that have already been litigated by the same parties or their privies based on the same cause of action." *Banner v. United States*, 238 F.3d

1348, 1354 (Fed. Cir. 2001). Collateral estoppel "relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153-54, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979)). "Collateral estoppel requires four factors: (1) the issues are identical to those in a prior proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues." *Banner v. United States*, 238 F.3d at 1354 (citing *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365-66 (Fed. Cir. 2000)).

Previously determined agency decisions may be given preclusive effect in subsequent lawsuits brought in federal courts. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 16 L. Ed. 2d 642, 86 S. Ct. 1545, 176 Ct. Cl. 1391 (1966). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *Id.* (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 84 L. Ed. 1263, 60 S. Ct. 907 (1940)). The United States Supreme Court also endorsed giving collateral estoppel effect to administrative factfinding in *University of Tennessee v. Elliott*, 478 U.S. 788, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986). The Court stated:

> Thus, Utah Construction, which we subsequently approved in *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 484-485, n.26, 72 L. Ed. 2d 262, 102 S.Ct. 1883, 1899, n.26 (1982), teaches that giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforc-

> ing repose. This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, *Allen v. McCurry*, 449 U.S. at 94, 101 S. Ct. at 414, is equally implicated whether fact-finding is done by a federal or state agency.

478 U.S. at 798; *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991). "An issue on which relitigation is foreclosed may be one of evidentiary fact, of 'ultimate fact' (i.e., the application of law to fact), or of law." Restatement (Second) of Judgments, § 27 cmt. c (1982).

In determining whether an agency has acted in a judicial capacity, the United States Court of Appeals for the Seventh Circuit has offered useful guidance to identify the safeguards which indicate the requisite judicial capacity: "(1) representation by counsel, (2) pretrial discovery, (3) the opportunity to present memoranda of law, (4) examinations and cross-examinations at the hearing, (5) the opportunity to introduce exhibits, (6) the chance to object to evidence at the hearing, and (7) final findings of fact and conclusions of law." *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1300 (7th Cir. 1992) (per curiam). Other courts have held that an agency decision will not be given collateral estoppel effect if the agency proceeding lacked certain characteristics utilized in court proceedings. *See also Delamater v. Schweiker*, 721 F.2d 50, 53-54 (2d Cir. 1983) (finding that "an action taken by an administrative agency to grant or deny a benefit is not an adjudicated action unless the agency has made its decision using procedures substantially similar to those employed by the courts" and that an administrative decision in which "there was no hearing, no testimony, no subpoenaed evidence, no argument, no opportunity to test any contention by confrontation" would not be given preclusive effect); *Howard v. United States*, 497 F.2d 1270, 1272 (7th Cir. 1974) (finding that the

Internal Revenue Service's (IRS) determination which failed to result in a disallowance of the plaintiffs' claimed theft loss was not "judicial in nature but administrative" and did not preclude the IRS from reconsidering the taxpayer's liability). In *Nasem v. Brown*, 193 U.S. App. D.C. 416, 595 F.2d 801 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit considered whether to give collateral estoppel effect to an agency decision regarding a reprisal claim. The complainant had filed a written charge containing all facts pertinent to the alleged reprisal within fifteen days of the alleged occurrence and within fifteen days thereafter, the employer agency had investigated the charge and filed its response with the agency pursuant to 5 C.F.R. § 713.262(b)(1). 595 F.2d at 806-07. Based on the procedures established at the administrative level, particularly the inability of the parties to present live witness testimony in a case which turned on retaliatory motivation, the Nasem court found that the administrative decision did not collaterally estop the District Court from reconsidering the plaintiff's reprisal claim because the procedures involved did "not provide procedural safeguards contemplated by Utah Construction." *Id.* at 807.

The OPM, a federal executive branch agency, credited Mr. Crowley with primary Law Enforcement Officer retirement coverage under 5 U.S.C. §§ 8331(20) and 8336(c) from June 15, 1974 until June 15, 1986, and secondary Law Enforcement Officer retirement coverage from June 16, 1986 until September 30, 1991. Plaintiff currently seeks secondary administrative credit from October 1, 1991 to October 30, 1994 and secondary supervisory credit from October 31, 1994 to October 1, 2001.

In Mr. Crowley's case, the procedures followed by OPM in granting primary and secondary credit to the plaintiff from 1974 until 1991 do not demonstrate that OPM acted in a judicial capacity. Under the Code of Federal Regulation sections

in effect at the time that Mr. Crowley was granted Law Enforcement Officer credit, an employee could submit an individual request to the employing agency for a determination of whether the employee's position qualified as a primary or secondary position. *See* 5 C.F.R. § 831.905(b)(1)(ii) (1984); 5 C.F.R. § 831.908(b) (1992). Once the employee submitted his or her application, a DEA official would review the employee's application and submit an advisory opinion to OPM. *See* 5 C.F.R. § 831.908(b) (1992). After reviewing the employee's application, including any documentary evidence and DEA's recommendation, OPM would issue a final determination based on the papers. 5 C.F.R. § 831.909. The plaintiff does not claim that either the employee or the DEA ever had the opportunity to conduct pretrial discovery, present memoranda of law, conduct examinations or cross-examinations of witnesses, introduce exhibits, or object to any evidence presented. In fact, the procedures employed at the administrative level to determine whether Mr. Crowley qualified for Law Enforcement Officer credit from 1974 until 1991 are similar to the procedures followed in *Nasem v. Brown*, which the Nasem court found inadequate to show that the agency had acted in a judicial capacity. 595 F.2d at 807. Because the procedures employed at the administrative level did not contain judicial-type procedures, which ensure that the issues presented are fully explored or litigated, the court finds that OPM did not act in a judicial capacity and no judicial-like proceeding was held regarding Mr. Crowley's claims. OPM's decision granting Mr. Crowley primary and secondary credit from 1974 until 1991, nor MSPB's dismissal of Mr. Crowley's appeal to the MSPB without prejudice, and prior to any proceeding on the merits, does not preclude the court from reconsidering whether Mr. Crowley occupied a primary position when he served as a Diversion Investigator from 1974 to 1986 and whether he occupied secondary positions from 1986 until 1991.

In the present case, as part of the court's consideration of the plaintiff's entitlement to secondary credit, the court must consider whether the plaintiff occupied a primary position for the purposes of the transfer requirement of 5 C.F.R. § 831.904 (2002). Thus, a change in the legal atmosphere regarding determinations of primary credit could effect a change regarding determinations of secondary credit. In *Bingaman*, the United States Court of Appeals for the Federal Circuit noted the significant change of standards at the MSPB and utilized in decisions issued by that Board regarding Law Enforcement Officer credit. 127 F.3d at 1437. The MSPB decisions, however, do not serve as binding precedent for this court, although, of course, decisions issued by the United States Court of Appeals for the Federal Circuit do bind this court. The MSPB decisions reviewed by the Federal Circuit were significantly fact bound and the appellate review by the Federal Circuit was focused on whether each of the decisions issued by the MSPB was arbitrary, capricious or not in accordance with the law. In each of the key Federal Circuit cases reported, the appellate court held that the MSPB's finding respecting eligibility for Law Enforcement Officer credit was not arbitrary, capricious or otherwise not in accordance with law. In other words, in each of those cases, based on the factual record, the plaintiff failed to meet the burden to establish reversible error by the Board. *See, e.g., Hall v. Dep't of the Treasury*, 264 F.3d at 1054.

Moreover, with respect to determining eligibility for Law Enforcement Officer credit, direction from the Federal Circuit on how to follow their guidance remains somewhat undefined. The key cases decided by the court in which opinions were issued appear to establish exemplary, nonbinding guidelines from which the finder of fact can choose, depending on the individual facts of the case, to assist in application of the statutory definition when determining eligibility for Law Enforcement Officer credit. The Federal Circuit decisions do not dictate that the factors considered in

Bingaman, *Hannon*, *Watson* or *Hall* must be applied to every case considering an employee's eligibility for Law Enforcement Officer credit, including eligibility in different work assignments or those arising in this court, as opposed to at the MSPB. In *Hall v. Department of the Treasury*, the court wrote:

> as we stated in Hannon, the evaluation of and weight to be given to the various Bingaman considerations and the other evidence in the record are judgment calls that rest primarily within the direction of the Board . . . It is not our function to substitute our judgment for that of the agency [finder of fact] regarding the weight to be given to those considerations.

264 F.3d at 1060 (citing *Hannon v. Dep't of Justice*, 234 F.3d at 681). In *Watson v. Department of the Navy*, 262 F.3d 1292, the court explicitly held that "this court, however, has never adopted the Bingaman factors; nor has the court held that federal employees are always entitled to LEO coverage so long as they satisfy the Bingaman factors." *Watson v. Dep't of Navy*, 262 F.3d at 1301. In addition, the Watson court, when listing the factors it considered in deciding the case, stated that the five factors it was setting forth were the "most probative factors," but not required factors to be considered in every case involving Law Enforcement Officer credit. *Id.* at 1302. In *Hall v. Department of the Treasury*, the court wrote, "no single factor is essential or dispositive." 264 F.3d at 1056-57. As is discussed more fully below in an in depth discussion of the governing statute, regulations and the *Hobbs*, *Bingaman*, *Hannon*, *Watson*, and *Hall* cases, this court does not believe that the applicable governing law for this court has significantly changed from the statutory definition. Thus, the exception to collateral estoppel principles invoked by the defendant would not prevent the application of collateral estoppel, if it was otherwise appropriate.

Furthermore, with respect to the application of collateral estoppel regarding whether Mr. Crowley occupied a primary position, the record does not contain any facts, instrument, or transaction of a form separable from the previous determinations of Mr. Crowley entitlement to primary credit. In *Bingaman*, the facts considered in the later proceeding were clearly separable because the employee sought an award of primary credit for a different time period. *Bingaman v. Dep't of Treasury*, 127 F.3d at 1434. Although the employee's job description and duties may have been materially identical, Bingaman's duties for the period July 15, 1993 through July 13, 1994, were clearly separable from Bingaman's duties for the period from February 28, 1989 through July 15, 1993. Likewise, in *Commissioner v. Sunnen*, 333 U.S. 591, 92 L. Ed. 898, 68 S. Ct. 715, the royalties paid pursuant to the 1928 license contract were separable from the royalties paid pursuant to later license contracts. 333 U.S. at 602. Additionally, in *Sunnen*, the royalties paid pursuant to the 1928 contract that were distributed from 1929 to 1931 were separable from the royalties paid pursuant to the same contract, but distributed in 1937. *See id.* at 595-96.

In the present case the facts considered by this court are not separable from the facts considered by the OPM in 1974 through 1991 when it granted Mr. Crowley primary credit. If this court were to consider Mr. Crowley's eligibility for primary credit, it would consider the very same facts considered by OPM in its determination regarding Mr. Crowley's primary credit—namely, Mr. Crowley's job description and responsibilities from June 15, 1974 to June 15, 1986. None of the facts relevant to Mr. Crowley's entitlement to primary credit have changed, and if collateral estoppel were otherwise appropriate, this court would not reconsider a final decision made on identical facts that are not separable in any way, shape, or form. In Mr. Crowley's case, however, there has been no action by an administrative agency acting in a judicial capacity to resolve issues of fact properly before it in

a situation in which the parties have had an adequate opportunity to litigate. *See United States v. Utah Constr. and Mining Co.*, 384 U.S. at 422. Thus, collateral estoppel is inappropriate.

IV. MR. CROWLEY'S CLAIMS

As discussed above, the rules of statutory construction are applicable to the interpretation of administrative regulations. These rules of statutory construction, therefore, will be used to interpret the relevant statute and the regulations in the present case. The court's analysis begins with the plain language of the statute. *Duncan v. Walker*, 533 U.S. 167, 172, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001); *Carter v. United States*, 530 U.S. 255, 257, 147 L. Ed. 2d 203, 120 S. Ct. 2159 (2000). In interpreting the plain meaning of the statute, it is the court's duty, if possible, to give meaning to every clause and word of the statute. *Duncan v. Walker*, 533 U.S. at 167; *Williams v. Taylor*, 529 U.S. 362, 404, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) (describing as a "cardinal principle of statutory construction" the rule that every clause and word of a statute must be given effect if possible). Similarly, the court must avoid an interpretation of a clause or word which renders other provisions of the statute inconsistent, meaningless, or superfluous. *Duncan v. Walker*, 533 U.S. at 174 (noting that court's should not treat statutory terms as "surplusage"). "'When two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Vimar Seguros y Reaseguros, S.A. v. M/ V Sky Reefer*, 515 U.S. 528, 533, 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974)); *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir.), reh'g denied (2000).

A court must not stray from the statutory definition of a term. *See Stenberg v. Carhart*, 530 U.S. 914, 942, 147 L. Ed. 2d 743, 120 S. Ct. 2597 (2000); *Meese v. Keene*, 481 U.S.

465, 484-485, 95 L. Ed. 2d 415, 107 S. Ct. 1862 (1987); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979). "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. at 484-85. As the United States Court of Appeals for the Federal Circuit stated in *AK Steel Corp. v. United States*:

> When Congress makes such a clear statement as to how categories are to be defined and distinguished, neither the agency nor the courts are permitted to substitute their own definition for that of Congress, regardless of how close the substitute definition may come to achieving the same result as the statutory definition, or perhaps a result that is arguably better.

226 F.3d 1361, 1372 (Fed. Cir. 2000). When a word is undefined, court's regularly give that term its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 130 L. Ed. 2d 682, 115 S. Ct. 788 (1995); *AK Steel Corp. v. United States*, 226 F.3d at 1371.

A singular term, however, may not be read in isolation. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852, 150 L. Ed. 2d 62, 121 S. Ct. 1946 (2001) (citing *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 99, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992)). The "meaning of a provision is 'clarified by the remainder of the statutory scheme . . . .'" *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18, 149 L. Ed. 2d 401, 121 S. Ct. 1433 (2001) (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs, Ltd.*, 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988) and describing statutory construction as a "holistic endeavor"). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *King v. Saint Vincent's Hosp.*, 502 U.S. 215,

221, 116 L. Ed. 2d 578, 112 S. Ct. 570 (1991) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir.1941) (L. Hand, J.)).

When the statute provides a clear answer, the court's analysis is at an end. *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254, 147 L. Ed. 2d 187, 120 S. Ct. 2180 (2000) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999)). Thus, when the "'statute's language is plain, "the sole function of the courts is to enforce it according to its terms."'" *Johnson v. United States*, 529 U.S. 694, 723, 146 L. Ed. 2d 727, 120 S. Ct. 1795 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917))). In such an instance, the court will not consider "conflicting agency pronouncements" or "extrinsic evidence of a contrary intent." *Weddel v. Sec'y of Dep't of Health and Human Servs.*, 23 F.3d 388, 391 (Fed. Cir. 1994) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992) (noting that a court must not defer to agency interpretation contrary to intent of Congress evidenced by unambiguous language) and *Darby v. Cisneros*, 509 U.S. 137, 147, 125 L. Ed. 2d 113, 113 S. Ct. 2539 (1993)). "Only language that meets the constitutional requirements of bicameralism and presentment has true legal authority." *Weddel v. Sec'y of Dep't of Health and Human Servs.*, 23 F.3d at 391. (citing *INS v. Chadha*, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)). "'Courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point.'" *Shannon v. United States*, 512 U.S. 573, 583-84, 129 L. Ed. 2d 459, 114 S. Ct. 2419 (1994) (quoting *Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 259 U.S. App. D.C. 168, 814 F.2d 697, 712 (D.C. Cir. 1987)). Consequently, if a statute is plain and unequivocal on its face, there is usually no need to resort

to the legislative history underlying the statute. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001) (citing *Ratzlaf v. United States*, 510 U.S. 135, 147-148, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994) ("We do not resort to legislative history to cloud a statutory text that is clear.")).

There are select instances when resorting to legislative history is proper. For example, a court may consider legislative history if:

> the plain meaning produces a result that is not just "harsh," *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576, 102 S. Ct. 3245, 3252, 73 L. Ed. 2d 973 (1982), "curious," *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172, 98 S. Ct. 2279, 2291, 57 L. Ed. 2d 117 (1978), or even "stark and troubling," Estate of Cowart, 505 U.S. at [483], 112 S. Ct. at 2589[8], but "so bizarre that Congress 'could not have intended' it," *Demarest v. Manspeaker*, 498 U.S. 184, 186, 190-91, 111 S. Ct. 599, 601-02, 603-04, 112 L. Ed. 2d 608 (1991).

Weddel v. Sec'y of Dep't of Health and Human Servs., 23 F.3d at 391. Moreover, legislative history may be introduced into the analysis to resolve an ambiguous statute. *Ratzlaf v. United States*, 510 U.S. at 148 n.18 (citing *Barnhill v. Johnson*, 503 U.S. 393, 401, 118 L. Ed. 2d 39, 112 S. Ct. 1386 (1992)); *Patterson v. Shumate*, 504 U.S. 753, 761, 119 L. Ed. 2d 519, 112 S. Ct. 2242 (1992).

"If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 580, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995). "The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469

U.S. 70, 76, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969)), reh'g denied 469 U.S. 1230 (1985). "'The fears and doubts of the opposition are no authoritative guide to the construction of legislation'" because of the likelihood that those in opposition tend to overstate the reach of the bill in question. *Bryan v. United States*, 524 U.S. 184, 196, 141 L. Ed. 2d 197, 118 S. Ct. 1939 (1998) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394, 95 L. Ed. 1035, 71 S. Ct. 745, 44 Ohio Op. 395, 60 Ohio Law Abs. 81 (1951)). Moreover, statements by individual legislators should not be given controlling weight, although such statements may evidence congressional intent when consistent with statutory language and other pieces of legislative history. *Brock v. Pierce County*, 476 U.S. 253, 263, 90 L. Ed. 2d 248, 106 S. Ct. 1834 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 567, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984)).

"'Subsequent history is less illuminating than the contemporaneous evidence.'" *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 170, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001) (quoting *Hagen v. Utah*, 510 U.S. 399, 420, 127 L. Ed. 2d 252, 114 S. Ct. 958, reh'g denied, 511 U.S. 1047, 128 L. Ed. 2d 222, 114 S. Ct. 1580 (1994); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77, n.6, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994) ("The views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight . . . and the views of the committee of one House of another Congress are of even less weight."). But cf. *Loving v. United States*, 517 U.S. 748, 770, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996) ("'"Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."'") (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81, 23 L. Ed. 2d 371, 89 S. Ct. 1794

(1969))). In this regard, a court should give little weight to attempts to infer Congressional intent to adopt judicial interpretations of a statutory provision when Congress revises the statutory scheme, but fails to amend the provision in question. *See Alexander v. Sandoval*, 532 U.S. 275, 292, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001). Similarly, "'failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute."'" *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. at 170 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 L. Ed. 2d 579, 110 S. Ct. 2668, (1990))).

Thus, in the instant case, when determining entitlement to Law Enforcement Officer credit, the court begins with the plain language of the statute and the regulations. Mr. Crowley claims that he is entitled to Law Enforcement Officer credit in the secondary administrative category for the Staff Coordinator position he held from October 1, 1991 to October 30, 1994, and for Law Enforcement Officer credit in the secondary supervisory category for the Group Supervisor position he has held from October 31, 1994 to April 1, 2001. To prove his eligibility for a special rate of pay under FLEPRA section 403, 5 U.S.C. § 5305 note (2000), a special pay adjustment under FLEPRA section 404, 5 U.S.C. § 5305 note, and premium pay pursuant to FLEPRA section 410, 5 U.S.C. §§ 5542, *see also* § 5547, the plaintiff must meet a threshold requirement of demonstrating that he has Law Enforcement Officer status.

As defined by the applicable statute, a "law enforcement officer" means "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee

engaged in this activity who is transferred to a supervisory or administrative position." 5 U.S.C. § 8331(20) (2000). The regulations governing determinations of Law Enforcement Officer credit reiterate the definition set forth in 5 U.S.C. § 8331(20) and supplement the statutory definition by providing: "The definition does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States." 5 C.F.R. § 831.902 (2002).[17]

The regulations also define "primary duties" as those duties which: (1) "Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;" (2) "occupy a substantial portion of the individual's working time over a typical work cycle;" and (3) "are assigned on a regular and recurring basis." 5 C.F.R. § 831.902 (2002). Moreover, "duties that are of an emergency, incidental, or temporary nature cannot be considered 'primary' even if they meet the substantial portion of time criterion." *Id.* The versions of the C.F.R. issued from 1991 until the present also provide the following additional guidance: "In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties." *See, e.g.*, 5 C.F.R. § 831.902 (2002). The fifty percent standard set forth after 1991 is consistent with the rest of the regulation, and the court finds that this standard is helpful for determining whether the duties required by the statute were Mr. Crowley's primary duties.

A secondary position is defined as a position that:

(1) Is clearly in the law enforcement or firefighting field;

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[17] This regulation was promulgated on December 17, 1987. *See* Subpart I-Law Enforcement Officers and Firefighters, 52 Fed. Reg. 47,894 (Dec. 17, 1987) (codified at 5 C.F.R. § 831.902).

(2) is in an organization having a law enforcement or firefighting mission; and

(3) Is either—

(i) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of law enforcement officers or firefighters in primary positions; or

(ii) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a prerequisite.

5 C.F.R. § 831.902.

In addition to proving that he occupies a secondary position, the plaintiff must also meet the following criteria: (1) the employee is transferred directly (i.e., without a break in service exceeding three days) from a primary position to a secondary position; and (2) if applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding three days. 5 C.F.R. § 831.904(a)(1)-(2). As noted above, to meet the transfer requirement, the plaintiff must show that he occupied a primary position. A "primary position" means a position whose primary duties are: "Investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 C.F.R. § 831.902.

"An employee who requests credit for service under 5 U.S.C. § 8336(c) bears the burden of proof with respect to that service . . . ." 5 C.F.R. § 831.906(a)(2002).[18] In addition, beginning in 1990, coverage "in a position or credit for past service will not be granted for a period greater than 1 year

[18] Prior to 1994, this quote was contained in 5 C.F.R. § 831.908(a). *See, e.g.*, 5 C.F.R. 831.908(a) (1993).

prior to the date that the request from an individual is received . . . by the employing agency, the agency where past service was performed, or OPM." 5 C.F.R. § 831.906(e) (2001).[19]

A. Break in Service

For entitlement to Law Enforcement Officer credit, Mr. Crowley must show that there were no voluntary breaks in service exceeding three days between any of the transfers Mr. Crowley made, including from his primary position to his secondary position and between his various secondary positions. Mr. Crowley testified that there were no breaks in his service throughout his DEA career between any of the various positions he has held within DEA since 1974. No contrary evidence has been presented to the court. Therefore, the court finds that Mr. Crowley was continuously employed in a position within DEA from 1974 until he retired on October 1, 2001.

B. Primary Position

To meet the transfer requirement for secondary credit, the plaintiff must prove that he occupied a primary position and that he transferred directly from that primary position into a secondary position. 5 C.F.R. § 831.904(a) (2002). To show that he occupied a primary position, the plaintiff must show that his primary duties meet the definition of law enforcement officer, namely the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 C.F.R. § 831.902 (emphasis added). This definition is identical to the definition established in 5 U.S.C. § 8331(20) (2000), which sets forth the definition of a "law enforcement officer." Notably, both the applicable statute and regulations use the disjunctive "or" in

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[19] From 1990 to 1993, this regulation appeared at 5 C.F.R. § 831.908(c). *See, e.g.*, 5 C.F.R. § 831.908(c) (1993).

the language chosen. In *Felzien v. OPM*, 930 F.2d 898 (Fed. Cir. 1991), the United States Court of Appeals for the Federal Circuit discussed the use of the word "or" in 5 U.S.C. § 8331(21) (1988), as it related to the standard for entitlement to preferential credit for a firefighter. The Felzien court stated:

> Notwithstanding OPM's assertion to the contrary, "or" means "or": an employee can qualify either by controlling and extinguishing fires or by maintaining and using firefighting apparatus and equipment. The House Report does imply that employees must be exposed to some hazard to qualify even under the maintenance and use clause, but that does not collapse the two clauses into one.

Id. at 902. Similarly, in interpreting the definition of "law enforcement officer" pursuant to 5 U.S.C. § 8331(20) (2000), "or" means "or." An employee qualifies for Law Enforcement Officer credit if his or her primary duties are the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 U.S.C. § 8331(20) (emphasis added). Upon review of the language of the applicable statute and regulations, the court finds that the plain meaning of the language used is clear. Thus, the court should not look to the legislative history to interpret or modify the standard articulated in the words of the statute for determining eligibility as an Law Enforcement Officer in a primary position, since the meaning of the words is clear in the statute and regulation.

The words and the sentence structure of the statute and regulation defining "law enforcement officer" are uncomplicated and have remained unchanged since 1990. Moreover, Congress set forth a specific definition of "law enforcement officer." In doing so, Congress intended to exclude all other unstated meanings. *See Meese v. Keene*, 481 U.S. at 484-85.

To be considered "primary duties," the investigative duties of an Law Enforcement Officer must meet three prongs. Primary duties are those that: (1) are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position; (2) occupy a substantial portion of the individual's working time over a typical work cycle; and (3) are assigned on a regular and recurring basis. 5 C.F.R. § 831.902 (2002). The general guideline under the regulation provides that "in general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his primary duties." *Id.*

Although, as noted in the DEA study of the Diversion Control Program conducted from May 1982 until April 1983 and discussed above, the Diversion Investigator position was originally created to "ensure [] compliance with the regulatory aspects of the Controlled Substance Act," the court is concerned, however, not with the reasons why the position was created, but with why this position existed at the time of application for Law Enforcement Officer credit. *See Watson v. Dep't of the Navy*, 262 F.3d at 1300. The DEA study noted the evolution of the Diversion Investigator from a regulatory inspector to a criminal investigator. Moreover, testimony at trial described above demonstrated that Diversion Investigators, such as Mr. Crowley and Mr. Sullivan, spent over fifty percent of their time on criminal investigations following 1974. As testified to at the trial, the percentage of time spent on criminal matters by Diversion Investigators in the Boston regional office was even more pronounced due to the low concentration of pharmaceutical manufacturers, distributors and warehouses within the area covered by the Boston regional office and the correspondingly low number of necessary cyclic investigations.

There is nothing in the record to suggest that the DEA took deliberate action to direct Diversion Investigators away from criminal investigative work. Although the agency, in the

Miller and Muller Memoranda, discussed more fully above, announced restrictions on Diversion Investigators regarding certain specific activities, such as undercover work, surveillance, directing or paying informants and execution of search warrants, a Diversion Investigator's primary duties still involved the investigation of individuals suspected of offenses against the criminal laws of the United States. *See* 5 U.S.C. § 8331(20) (2000); 5 C.F.R. § 831.902 (2002). Moreover, no evidence to the contrary was introduced to establish that the DEA altered the criminal investigative nature of a Diversion Investigator's primary duties.

Furthermore, Mr. Crowley testified that from 1974 until 1986, as a Diversion Investigator, he only spent fifteen to twenty percent of his time on cyclic investigations and that the remaining eighty to eighty-five percent of his time was spent on criminal investigations. Two of Mr. Crowley's supervisors, John Cronin and Dennis Johnson, and another Diversion Investigator, Edward Sullivan, confirmed Mr. Crowley's testimony in this regard. The evidence establishes that Mr. Crowley had frequent, direct contact with criminals and criminal suspects when he interviewed witnesses and developed informants. The plaintiff also participated in searches, conducted surveillance and gathered evidence. The evidence related to Mr. Crowley's actual duties support his assertion that he spent over fifty percent of his time as a Diversion Investigator conducting criminal investigations. Furthermore, the defendant did not attempt to prove and did not offer evidence that Mr. Crowley did not spend more than fifty percent of his time performing criminal investigative duties. Thus, the record supports the plaintiff that from 1974 until 1986, while Mr. Crowley was a Diversion Investigator, he was assigned to and spent over fifty percent of his time working on criminal investigations.[20] In performing this

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[20] Moreover, a government study of the Diversion Program issued in 1990 also concludes that as late as 1990, "despite the differences between

criminal work, Mr. Crowley investigated criminals or suspected criminals for violating the criminal laws of the United States by diverting controlled substances into illegal channels. Because criminal investigations constituted a major portion of Mr. Crowley's assigned Diversion Investigator duties in his position from 1974 to 1986, and because Mr. Crowley spent over fifty percent of his time during those years investigating individuals suspected or convicted of offenses against the United States, based on the plain language of 5 U.S.C. § 8331(20) (2000), the court finds that Mr. Crowley's duties consisted primarily of investigating individuals suspected or convicted of offenses against the criminal laws of the United States. Thus, Mr. Crowley occupied a primary position when he served as a Diversion Investigator from 1974 until 1986.

As discussed above, this court finds that the plain meaning of the applicable statute is clear and that the court should not look beyond the statute to analyze the plaintiff's claims. Moreover, even the MSPB tacitly acknowledged that it was looking to the legislative history instead of applying the plain meaning of the statute. In *Hobbs v. OPM*, 58 M.S.P.R. 628, 632 (1993), the MSPB stated that "[a] literal reading of 5 U.S.C. § 8331(20) would appear to afford the appellant Law Enforcement Officer retirement credit for his service as a Special Inspector because his duties in that position were 'primarily the investigation . . . of individuals suspected . . . of offenses against the criminal laws of the United States.'" *Id.* (footnote omitted). The Board stated, however: "We find, however, that such a literal reading [of 5 U.S.C. § 8331(20)] would be contrary to the clearly expressed legislative intent." *Id.* Despite its statement that a literal reading would produce a clear result, suggesting that no resort to legislative history

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the [1810 and the 1811] series, . . ., 1810 Diversion Investigators are conducting diversion criminal investigations (for up to 60 percent of their time) which technically satisfies OPM's definition for eligibility under 6(c)."

was appropriate, the Board in Hobbs stated, "the term 'investigation' under 5 U.S.C. § 8331 (20) should be construed as 'criminal investigation,'" regardless of the fact that the word "criminal" does not appear in the statutory definition. 58 M.S.P.R. at 633. Based on its own definition of the term "investigation," constructed, as it stated "in light of the legislative intent," the Board considered factors to determine eligibility for Law Enforcement Officer credit, which, in its view, indicated work in criminal investigations, including "unusual physical hazards for the investigator, deriving from frequent contacts with criminals and suspected criminals," "physical stamina and vigor," and requirements that the investigator "work for long stretches of time without a break, be on call 24 hours a day, and/ or carry weapons." *Id.* The Board in Hobbs, therefore, relied on other than the normal rules of statutory construction, although the Board stated, "the plain language of a statute should control absent a clearly expressed legislative intent to the contrary." 58 M.S.P.R. at 632 (citing *Miller v. Dep't of Army*, 987 F.2d 1552, 1555 (Fed. Cir. 1993)). But *see Weddel v. Sec'y of Dep't of Health and Human Servs.*, 23 F.3d at 391 (noting that plain meaning may be discarded only when the result is "so bizarre that Congress 'could not have intended' it.").

The relevant portion of the legislative history, on which the Hobbs court relied, was a statement made in a Senate report:

> The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are

> occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire.

S. Rep. No. 93-948, reprinted in 1974 U.S.C.C.A.N. 3698, 3699. This statement in the Senate report does not contradict the standard set forth in the statute. The legislative history does not establish the criteria for Law Enforcement Officer status, but merely articulates a Congressional goal to develop a more youthful workforce for certain federal occupations. The goal of determining which occupations should be composed of a youthful workforce was considered by the Congress which, nonetheless, ultimately passed a plain English definition of Law Enforcement Officer, which does not include such a statutory goal. Given the clear, unambiguous language of the statute, the legislative history is interesting, but should not be used to alter the plain meaning of the words Congress chose to employ. The statutory language, when applied to Mr. Crowley's case, although not welcomed by the agency, does not produce a result that is so bizarre that Congress could not have intended it.

Subsequent to the issuance of Hobbs, the MSPB decided a string of additional cases involving Law Enforcement Officer eligibility, basing their determinations on the factors set forth in Hobbs. *See, e.g., Taylor v. Dep't of Treasury*, 68 M.S.P.R. at 696; *Peek v. OPM*, 63 M.S.P.R. at 432; *Sauser v. OPM*, 59 M.S.P.R. at 492.

Then, in *Bingaman v. Department of the Treasury*, 127 F.3d 1431, the United States Court of Appeals for the Federal Circuit affirmed an MSPB decision regarding Customs Service Detention Systems Specialists or their supervisors, which considered the factors first enunciated in the Hobbs decision. Without directly addressing whether or not the statutory and regulatory language of 5 U.S.C. § 8331(20) and 5 C.F.R. 831.902 are clear on their face, the Bingaman court stated that "the statutory term 'law enforcement officer' has not been

given expansive application." *Id.* at 1435. The court also stated that "the definition of law enforcement officer in section 8331(20) has been 'strictly construed.'" *Id.* at 1435 (citing *Ryan v. MSPB*, 779 F.2d 669, 672 (Fed. Cir. 1985)). Nonetheless, because, according to the court, the statute provided only general guidance, the court went on to expand the statutory definition by approving, as not arbitrary, capricious or not in accordance with the law, the Board's decision to resort to the legislative history to support the MSPB's development of factors to be used to determine Law Enforcement Officer eligibility. 127 F.3d at 1436. The Bingaman court considered six factors laid out in prior M.S.P.B. decisions: (1) frequent, direct contact with criminal suspects; (2) authorization to carry a firearm; (3) interrogation of witnesses and suspects, giving Miranda warnings when appropriate; (4) working for long periods without a break; (5) being on call twenty-four hours a day; and (6) being required to maintain a level of physical fitness. *Id.* (citing *Hobbs v. OPM*, 58 M.S.P.R. 628; *Sauser v. OPM*, 59 M.S.P.R. 489; *Peek v. OPM*, 63 M.S.P.R. 430; *Ferrier v. OPM*, 66 M.S.P.R. 241). The court in Bingaman was careful to illustrate, however, that no single factor was "essential or dispositive." *Id.*

In *Hannon v. Department of Justice*, 234 F.3d 674, the Federal Circuit similarly affirmed a decision of the MSPB denying Law Enforcement Officer retirement credit to a Diversion Investigator (who is also a plaintiff in the group of cases consolidated before this court). The Hannon court followed the Bingaman case and applied the factors enunciated in that case, also without discussing the statutory construction, except to similarly state "we strictly construe the definition of law enforcement officer." *Id.* at 677 (citing *Bingaman v. Dep't of the Treasury*, 127 F.3d at 1435). The MSPB decision in Hannon also was reviewed using the arbitrary or capricious standard. 234 F.3d at 681-82.

More recently, in *Watson v. Department of the Navy*, 262 F.3d 1292, the United States Court of Appeals for the Federal Circuit elaborated on the language it had used in *Bingaman*, stating that in considering eligibility for Law Enforcement Officer coverage, "the six Bingaman factors may . . . be considered as necessary and appropriate," but that "this court . . . has never adopted the Bingaman factors; nor has the court held that federal employees are always entitled to LEO coverage so long as they satisfy the Bingaman factors." *Id.* at 1301, 1303. The Watson court noted that some of the most probative factors are not even a part of the Bingaman test. *Id.* at 1302. Thus, the Watson court established five factors, separate from the Bingaman factors, which it found to be the "most probative." The Watson court stated:

> In order to determine that an officer is entitled to LEO retirement credit, the officer must show that the primary duties of his or her position, as defined by 5 C.F.R. §§ 831.902, 842.802 [(1994)], are the investigation, apprehension, and[21] detention of criminals or suspects. The most probative factors, we hold, are: 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals; 2) whether there is an early mandatory retirement age; 3) whether there is a youthful maximum entry age; 4) whether the job is physically demanding so as to require a youthful workforce; and 5) whether the officer is exposed to hazard or danger.

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[21] Although the Watson court used the word "and" in describing the standard for Law Enforcement Officer eligibility, 5 U.S.C. § 8331(20) (1994) and 5 C.F.R. § 831.902 (1994), the versions of the statute and regulation the court was interpreting, state that a law enforcement officer position involves primarily the "investigation, apprehension, or detention" of criminals or suspected criminals. The 1994 version of the relevant statute and regulation are identical to those currently in force.

Id. at 1303 (emphasis in original). Although the Watson court reiterated the statutory language and, thus, the standard established by the plain language of 5 U.S.C. § 8331(20) (1994) and 5 C.F.R. § 831.902, the Watson court also relied on legislative intent. *Id.* at 1299. Based on the legislative history, the Watson court established a new list of factors it determined to be the "most probative." *Id.* at 1302. The Watson court, however, also did not mandate that these factors must be used in examining eligibility for Law Enforcement Officer credit in every case or that an employee must meet all the listed factors for entitlement to Law Enforcement Officer credit.

An even more recent Federal Circuit case is *Hall v. Department of the Treasury*, 264 F.3d 1050. Like the court in *Watson*, the court in *Hall v. Department of the Treasury* warned of over reliance on any particular set of factors. *Id.* at 1056. After reviewing the statute, but without specifically analyzing the plain meaning words of 5 U.S.C. § 8331, and after reviewing the legislative history of the statute, the Hall court found that the Bingaman factors did not run counter to or replace, but rather reflected, the statutory language. *Id.* at 1056. The Hall court characterized the Bingaman factors as a "set of tools" which was used by the MSPB to gauge whether the facts of a particular case fall within the definition of the statute. *Id.* The court warned, however, that "the list of considerations set forth in Bingaman is by no means an exhaustive or exclusive list of the considerations that bear on whether an employee qualifies for LEO service credit under the statute." *Id.* at 1057. Finally, the court noted that while certain factors could be used by a court in determining Law Enforcement Officer status, 5 U.S.C. § 8331 "serves as the ultimate measure of LEO credit activity." *Id.* at 1056.

As described by the Federal Circuit, the factors used by the MSPB and found reasonable by the Federal Circuit are useful to determine eligibility for Law Enforcement Officer credit.

In affirming the decisions of the MSPB, however, by finding that the Board's fact bound decisions were not arbitrary, capricious, or otherwise not in accordance with the law, the various decisions of the Federal Circuit have been careful to point out that the factors enunciated are not requirements, but only establish a framework which may be utilized.

Because, after careful consideration, this court finds that the plain language of the statute, 5 U.S.C. § 8331(20) (2000), and the regulation, 5 C.F.R. § 831.902 (2001), are clear and unambiguous when establishing the definition of Law Enforcement Officer to be used for determining entitlement to Law Enforcement Officer credit, Mr. Crowley clearly meets the applicable statutory standard. Moreover, because the appellate court has not articulated a precise, binding alternate or fixed standard, this court believes that it should decide plaintiff's case based on the statutory definition. If Congress wishes to change or further define the definition currently offered in the statute, and on which the regulation is based, certainly it can do so. At the present time, however, a fact finding body, such as this one, is left to define a methodology for determining entitlement to Law Enforcement Officer credit. This court believes that the simple words of the statute offer sufficient and clear guidance. However, as discussed below, based on the evidence offered at the trial, even when the factors established in Watson and Bingaman[22] are reviewed and some combination and selections from those cases is applied to the present case, the court finds that Mr. Crowley occupied a primary position as a Diversion Investigator. Because a lengthy, factfinding trial[23] was held at which relevant facts

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[22] The court in Hall applied the *Bingaman* factors and did not mention the *Watson* case.

[23] Similar to the work done in *Buckley v. United States*, 51 Fed. Cl. 174, the court is, again, appreciative of the excellent representation of their clients provided to the court during complex pretrial and trial proceedings by all of the counsel appearing in the Crowley case.

were elicited, this court includes a discussion of the application of the factors in the event that the appellate court disagrees with this court's statutory construction.[24]

"The evaluation of and weight to be given to the various *Bingaman* [*Watson* and *Hall*] factors and the [evaluation of the] other evidence in the record are judgement calls that rest primarily within the discretion of the [fact finder]." *Hannon v. Dep't of Justice*, 234 F.3d 674, 681 (Fed. Cir. 2000). Of course, the exercise of such discretion must be carried out in a way that is not arbitrary, capricious, or not in accordance with the law. Because when the Federal Circuit offered its formulas for determining Law Enforcement Officer credit eligibility, it did not state that each of the factors identified must be considered, did not establish the relative weight to be assigned to any such factor, and did not exclude the consideration of other factors, this court may balance the announced factors to determine which factors are more relevant to the question of whether the plaintiff performed law enforcement work.

Consistent with the statutory and regulatory definition of a "law enforcement officer," the court finds that the factor regarding whether the employee pursued or detained criminals is the most important factor for evaluating eligibility for Law Enforcement Officer credit. Second, the factors related to

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[24] The court notes that presiding officials in another forum have instituted extremely abbreviated proceedings to resolve cases factually similar to the ones before this court. At a recent status conference, however, counsel for both the plaintiff and the government refused to agree to abbreviated proceedings, even though *Crowley*, and *Buckley v. United States*, 51 Fed. Cl. 174, were selected as test cases in which comprehensive trial proceedings were to be held in order to develop a model to address the large number of remaining cases in this court. Although efforts to produce a reasonable and expeditious method to address the numerous remaining cases filed in this court will remain a priority, the court also is concerned that each plaintiff receive a fair hearing of his or her particular claims.

whether the job is physically demanding, and whether the officer is exposed to danger are also highly relevant to the analysis of eligibility for Law Enforcement Officer credit. In the court's opinion, the second and third Watson factors regarding age limits should be given less weight than the other Watson factors. Although youthfulness may be relevant to the ability to perform law enforcement duties (the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States," 5 U.S.C. § 8331(20) (2000), 5 C.F.R. § 831.902 (2002)), physical fitness is even more relevant and an older employee may be more "physically capable of meeting the vigorous demands of occupations which are far more taxing than most in federal service," than a younger individual. S. Rep. No. 93-948. Moreover, the absence of age limitations does not necessarily mean that in Law Enforcement Officer job descriptions, a youthful and physically fit work force, although not mandated by Congress, is not desirable. Furthermore, the third Watson factor, whether there is a maximum entry age, is not particularly helpful to determine whether an individual is capable of performing law enforcement duties because it appears to be related to the desire to ensure that the employees have a full career prior to collecting any retirement pay. An older individual may be performing law enforcement work for which he or she should receive credit. The statutory test centers on the nature of the actual work performed, not on the age of the employee performing the work. Thus, this court finds that the age limit factors, especially the maximum entry age, are less probative than the other factors identified in Watson.

The Watson court indicated that although the Circuit Court had never adopted the Bingaman factors or concluded that an employee who could satisfy all six Bingaman factors automatically would receive Law Enforcement Officer credit, "the six Bingaman factors may also be considered as necessary

and appropriate." 262 F.3d at 1303. The six factors listed in Bingaman are:

> (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving Miranda warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness.

Bingaman v. Dep't of Treasury, 127 F.3d at 1436. *Bingaman* factor (1) regarding frequent direct contact with criminal suspects requires a similar evaluation to *Watson* factor (1). *Bingaman* factor (6) regarding physical fitness encompasses primarily the same determination as *Watson* factor (4), which also relates to physical fitness, but without the phrase "so as to require a youthful work force." However, questions regarding the youthfulness of the work force in the *Watson* factors are more explicitly addressed in *Watson* factors (2) and (3), which are related to age limits. The *Watson* court apparently believed that the authority to carry a firearm (*Bingaman* factor (2)), the interrogation of witnesses and suspects, including giving Miranda warnings (*Bingaman* factor (3)), the length of the work periods (*Bingaman* factor (4)) and whether or not the employee is on call twenty-four hours a day (*Bingaman* factor (5)) were relevant, but not dispositive.

Given the direction of the Federal Circuit to use a combination of factors, including those articulated in *Watson* and *Bingaman,* a trial court is left with the task of assessing the eligibility of a particular work series or even of a particular employee, such as Mr. Crowley, on a case by case basis. This is only true, of course, if the precedent suggests that the trial court should ignore the clear words of the statute and regulations, 5 U.S.C. § 8331(20) (2000) and 5 C.F.R. § 831.902 (2002), by resorting to the legislative history and the case precedent based on a review and an interpretation of the

legislative history to elaborate on the statutory and regulatory definition.

At trial, there was substantial testimony presented relevant to the factors identified in *Bingaman* and *Watson*, because of the overlap between the factors identified in both cases, regarding the actual duties Mr. Crowley performed while he served as a Diversion Investigator with DEA. The plaintiff admits in his brief that "initially, in his service with DEA, he was assigned to so-called "cyclic" reviews of drug manufacturers. These were compliance reviews to assure that the manufacturer was able to account for the drugs produced and that diversion to illicit channels had not occurred." However, Mr. Crowley testified at trial that toward the end of 1974 or early 1975, he began performing criminal investigations, and that he spent at least eighty to eighty-five percent of his time conducting criminal investigations. In October 1979, the DEA instituted an official program called Operation SCRIPT which shifted the focus of the diversion program toward criminal investigations of pre-selected retail violators.

As noted above, in conducting these criminal investigations, Mr. Crowley had direct and frequent contact with criminal suspects, a number of whom were found to be armed. For example, when Mr. Crowley performed a search pursuant to an administrative warrant, as he did while investigating the Bodowin Pharmacy case, the Clukey Pharmacy case and the Manny's Apothecary case, Mr. Crowley interacted with the pharmacists who were suspected of violat ing the Controlled Substances Act. Moreover, during Mr. Crowley's investigations, he often interviewed witnesses who were either suspected of committing the crime under investigation or had committed other crimes. In the Bodowin Pharmacy case, Mr. Crowley interviewed drug addicts who had illegally purchased drugs from the pharmacy and whom he later found to have long criminal records. In the Wyeth Laboratories case, Mr. Crowley interviewed suspects who he

believed may have burglarized the distribution center in question. During the same case, Mr. Crowley interrogated a suspect in the Northampton State Police Barracks. And, in the Clukey Pharmacy case, Mr. Crowley interviewed Mr. Clukey, who was described by local police as the most prominent criminal suspect in the area.

Moreover, the testimony at trial revealed that Mr. Crowley frequently administered Miranda warnings to criminal suspects. In fact, Mr. Crowley was instructed by his supervisors to read Miranda warnings whenever appropriate. When Mr. Crowley and Mr. Hunt served the administrative warrant in the Bodowin Pharmacy case, they advised Mr. Bodowin of his Miranda rights. Prior to interrogating the suspect in the Wyeth Laboratories case, Mr. Crowley read him his Miranda rights. Although Mr. Haislip testified that Diversion Investigators did not routinely Mirandize people because Diversion Investigators did not have the authority to arrest people, he admitted that there may have been occasions when they gave Miranda warnings.

Mr. Crowley and the other witnesses also testified that Mr. Crowley worked long hours on criminal investigations, often without a break. During the Bodowin Pharmacy investigation, Mr. Crowley worked "unbelievably" long hours finding and interviewing patients and performing administrative inspection warrants. Mr. Crowley testified that he also worked long hours on the Wyeth Laboratories case. Christopher Egan, a Special Agent in the Diversion Unit of the Boston regional office from 1973 to 1977 testified that Mr. Crowley worked a lot of nights. John Cronin, Mr. Crowley's Group Supervisor from 1978 to 1982, testified that, "quite frequently they [Mr. Crowley's hours] were overtime or he would be working long hours waiting until the pharmacy to [sic] close or a doctor's office closed to interview the suspects without anybody around, or he would be following a suspect, and it would go beyond the normal working hours." Thus, Mr. Crowley's

hours were directed by the case he was working on, not by a preset regular work schedule, and he was required to work on cases when the case demanded.

The record also indicates that Mr. Crowley was on call twenty-four hours a day during his time as a Diversion Investigator. Edward Drinan, the Special Agent in Charge for the Portland, Maine DEA field office from 1977 through 1981, testified that he "considered every DEA employee to be at my beck and call, and I made them at my beck and call." James Carr, a member of the Boston police Drug Control Unit during Mr. Crowley's time as a Diversion Investigator worked with Mr. Crowley on the Manny's Apothecary case and testified: "There were times when I would call Mr. Crowley, whether it be on a Saturday or a Sunday or maybe at nighttime or during the day." During the Bodowin Pharmacy case, Mr. Crowley testified that he was on call to his Group Supervisor and to the prosecutor in the case. The Mercy Hospital case, described above, is one example of when Mr. Drinan called Mr. Crowley to respond quickly to a situation. Although Mr. Haislip testified that the DEA did not order Diversion Investigators to be on call twenty-four hours a day as part of their work, he also stated that, regarding on call duty, he was "not sure what may have been done at a local level that was not brought to my attention."

The record also indicates that Mr. Crowley's position as a Diversion Investigator was physically demanding. John Cronin, Mr. Crowley's supervisor from 1978 to 1982, testified that to be a Diversion Investigator:

> You had to be out long hours under very stressful conditions. You had to confront individuals or suspects that may have been, may become violent. You had to, quite often, move heavy objects, large cases of drugs. You had to inspect the premises within and without, up in the, often on the roof for security violations or for entrance to, for . . . burglaries.

Moreover, Mr. Cronin testified that all of the "investigative personnel," including Diversion Investigators, were allowed to take one hour, three times a week to attach to their lunch hours, to encourage them to workout and maintain physical fitness. This program was encouraged by "DEA management." Mr. Crowley testified that there was a small gym in the office and that the DEA paid for memberships at the YMCA. John Coleman, the Special Agent in Charge of the Boston regional office from 1985 to 1990, who eventually rose to Assistant Administrator for Operations, the third highest career job in the DEA, testified that "you need people who are physically robust to be able to defend themselves in an emergency, if necessary, because they are, again, dealing with potential adversaries, so you do need an individual who's somewhat robust and able to handle the hazards and difficulties of the job. "Mr. Haislip testified that the job of a Diversion Investigator was more physically demanding than "an ordinary job in headquarters." On November 8, 1988, Mr. Haislip wrote a memorandum to Thomas C. Kelly, a Deputy Administrator of the DEA, urging that OPM adopt physical standards for Diversion Investigators because "DEA does not have any approved physical standards for entry level Diversion Investigators."[25]

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[25] The plaintiff points to information provided on the DEA website, in the fall of 2001, under the title of "Diversion Investigator, A Career Opportunity." Although this website explained that "the duties of Investigators frequently require arduous physical exertion," there is no evidence in the record which demonstrates that the representations made on the web site were approved by OPM or by DEA. *See* www.dea.gov/job/diversion/standards.htm (November 26, 2001). The particular web page in question no longer appears on the DEA web site. An excerpt of the 1992 Personnel Manual related to the physical requirements for a Diversion Investigator do not contain the same representations regarding the "arduous physical exertion" required of Diversion Investigators previously found on the DEA website.

With regard to maximum entry level ages and mandatory retirement limitations, a study of the Diversion Program conducted by DEA, issued on November 21, 1990, and confirmed by Mr. Crowley, found that: "The 1811 Criminal Investigators are also subject to a maximum entry level age limitation (35 years) and to mandatory retirement provisions . . . In contrast, the 1810 Diversion Investigators are not subject to any restrictions on entry level age or to mandatory retirement."

Finally, despite the fact that Mr. Crowley's investigations focused on the criminal violations committed by professionals, the record indicates that Mr. Crowley faced a high degree of danger as a Diversion Investigator. In response to a question at trial as to whether dealing with doctors or pharmacists made a Diversion Investigator's job less dangerous, Mr. Coleman, who was in charge of the Boston regional office from 1985-1990, explained:

> It might appear that way except when you begin to think in terms of what these people have at risk. We do have, for example, a good deal of what's called impaired physicians, impaired health care workers ... Drug abuse inside the health care profession is a serious problem, has been recognized as such by the American Medical Association and other major organizations. Consequently, even in dealing with people who might, in the general sense, appear to be as you described, individuals that are impaired are often times dangerous, nonetheless, and as I mentioned, these people have a lot to lose. When you're dealing with a person who's perhaps a life long criminal, they take their chances, and perhaps when their day is up, they realize they've got to spend some time in prison, or whatever, but that's their life. They've chosen that life.
>
> These other folks, they've got a, they've got two lives going. They just don't have their criminal life. They

> have their professional life, and when that investigator walks through the door, whether it's a pharmacy or a doctor's office or a hospital facility of some sort, or even plant or warehouse, and, and begins to question somebody or review and inspect the documents, there's only one person at that point that really knows what's going on, and it's usually the party that's being investigated, and that person may react in strange ways. We've had situations where these people have reacted in very dangerous and difficult ways.

Mr. Egan testified that he asked Mr. Crowley whether he was armed "because I was concerned because some of the areas that he was in and some of the things he was doing were, had the potential of being dangerous." When asked as to the specific dangers he was concerned about, Mr. Egan stated:

> Well, in the parts of his job where he was working with criminal informants, the people, in general, who are criminal informants are criminals, themselves, and they, the places they go and the things they do are criminal in nature, and where there's a lot of money and drugs involved, there's always a potential of danger to the investigator.

Peter Silva, a sergeant with the Boston Police Department, testified: "It was always a wonder to us why they weren't armed." The record shows that many of the pharmacists under investigation were armed. Similarly, Mr. Cronin testified that he considered Mr. Crowley's job to be "extremely dangerous."

Mr. Crowley personally related a number of examples of the dangers he faced. For example, during Mr. Crowley's search for witnesses and "patients" in connection with the Bodowin pharmacy case, Mr. Crowley was constantly in contact with people who were abusing drugs. Indeed, during the Bodowin investigation, Mr. Crowley once announced himself

as a DEA agent to a room full of people doing drugs, an act he now admits as "kind of stupid." With regard to the Clukey investigation, Mr. Crowley interviewed and performed surveillance of Mr. Clukey, an armed and notorious criminal. Finally, during the investigation of Manny's Apothecary, Mr. Crowley conducted surveillance in a dangerous area of Boston that was controlled by organized crime and participated in a search.

The defendant argues that "the Miller and Mullen restrictions are highly relevant and indicative of the extent to which DEA minimized the element of danger for Diversion Investigators." The record, however, demonstrates that the Miller and Mullen memorandum were not always followed in the field. Mr. Crowley testified that he did not stand outside while Special Agents secured premises during searches. Moreover, Mr. Crowley testified that, following the Miller and Mullen memorandum, he would conduct surveillance, as long as he was accompanied by a special agent or police officer. Furthermore, the Miller and Mullen memorandum could not shield Diversion Investigators from danger. That the DEA felt it necessary to issue the Miller and Mullen memorandum is indicative of its understanding of the danger posed by the targets of the Diversion Investigators and the persons involved in the illegal diversion of controlled substances. Moreover, the record is replete with testimony, from a variety of sources all noted above, that Diversion Investigators faced danger from the pharmacists they were investigating and the persons who they came into contact with during those investigations.

The evidence presented at the trial demonstrates that as a Diversion Investigator, Mr. Crowley frequently pursued criminals or suspects through his investigations, as opposed to guarding life or property, when he conducted his criminal investigations of the illegal diversion of licit drugs by doctors and pharmacists. In addition, Mr. Crowley's job involved

physical demands and required physical fitness. As a Diversion Investigator, Mr. Crowley's position included frequent walking and climbing when he searched for potential witnesses and informants, as well as hauling evidence. Moreover, Mr. Crowley was exposed to danger when conducting his criminal investigations. Despite the official restrictions placed on Mr. Crowley by the Miller and Mullen Memoranda, Mr. Crowley faced hostile individuals when interviewing drug-seeking individuals, conducting surveillances, pursuing investigations in high-crime areas and participating in searches of locations occupied by hostile individuals who may have been armed. Thus, this court finds that based on the testimony and evidence presented at trial, Mr. Crowley has shown that he meets the first, fourth, and fifth factors set forth in *Watson v. Department of the Navy*, 262 F.3d 1292, all of which are somewhat subjective evaluations. Although the Diversion Investigator position did not have an early mandatory retirement age or a youthful maximum entry age, as discussed above, given the balancing to be made in the court's discretion, based upon the Federal Circuit's opinions in *Watson* and *Bingaman* and given the nature of Mr. Crowley's responsibilities and the work he performed, the identified age limits should be given less weight than the other three factors described in Watson.

The available evidence in the record relevant to the consideration of Law Enforcement Officer eligibility under the Bingaman factors also supports Mr. Crowley's claim that his primary duties involved the investigation of criminals and suspects. Several witnesses at trial supported Mr. Crowley's testimony that he had frequent direct contact with criminals and suspects during his investigations (Bingaman factor (1)). Mr. Crowley frequently interrogated witnesses to obtain information regarding the targets of his investigations, and he gave Miranda warnings when appropriate (Watson factor (1) and Bingaman factors (1) and (3)). The evidence shows that Mr. Crowley worked long hours (Bingaman factor (4)), in-

cluding evenings and weekends to conduct his investigations and that when he conducted surveillances over a period of time, he could not take a break without breaking the surveillance. Mr. Crowley also received calls after normal working hours from his colleagues and associates regarding his investigations, as well as from witnesses and informants. Although Mr. Crowley may not have been directed to be available on call, in order to meet his job description, Mr. Crowley understood that he needed to be available whenever the case required him to be available (Bingaman factor (5)). As stated above, Mr. Crowley's job entailed physical demands, although Diversion Investigators were not required to pass any physical fitness tests (Watson factor (4) and Bingaman factor (6)). Although Mr. Crowley was not authorized to carry a firearm, this factor should not be dispositive for the determination of whether Mr. Crowley performed law enforcement work, and was discounted by the Watson court. Upon consideration of the factors set forth in both Watson and Bingaman and the discussion of those factors in Hall, the court finds that Mr. Crowley has satisfied the factors that are most critical for eligibility for Law Enforcement Officer status and that, given the overall scope and depth of his actual duties, he, in fact, performed law enforcement work. Therefore, Mr. Crowley has established that he occupied a primary position as a Diversion Investigator.

C. Secondary Positions

As stated above, in addition to the transfer requirement, an employee seeking Law Enforcement Officer credit must show, if the employee has occupied multiple secondary positions after the initial transfer from a primary position, that he or she "has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days . . . ." 5 C.F.R. § 831.904(a)(2) (2002). Plaintiff argues that the court should not re-consider whether Mr. Crowley's supervisory positions qualify as sec-

ondary positions because "OPM determined that Mr. Crowley's service as a group supervisor met the criteria for credit as a law enforcement officer from June 16, 1986 through September 30, 1991," and that this decision should be considered final. In response, defendant contends that "pursuant to *Bingaman*, as well as the Supreme Court's decision in *Harper* [*v. Virginia Department of Taxation*, 509 U.S. 86, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993)], concerning the retroactivity of judicial interpretations of law, Mr. Crowley must demonstrate that the employees he supervised during this period were LEOs within the meaning of *Bingaman*."[26] Therefore, defendant argues that OPM's prior approval of Law Enforcement Officer credit using pre-*Bingaman* and pre-Watson standards, in the secondary supervisory category is not sufficient for meeting plaintiff's burden to show that he continuously occupied secondary positions after his transfer from a primary position.

As an initial matter, the plaintiff must meet the threshold requirements for receiving credit in a secondary position under 5 C.F.R. § 831.902 (2002), which provides that a secondary position must be: (1) "clearly in the law enforcement or firefighting field;" (2) "an organization having a law enforcement or firefighting mission;" and (3) either supervisory or administrative. As DEA investigators, Diversion Investigators are clearly in the law enforcement field and the DEA is clearly an organization having a law enforcement mission. Defendant does not claim that the plaintiff has not met these

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[26] In *Harper v. Virginia Department of Taxation*, the United States Supreme Court held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rules.

509 U.S. at 97.

requirements. Therefore, the court finds that all of plaintiff's secondary positions are clearly in the law enforcement field and that DEA has a law enforcement mission.

As discussed above, under the regulations in effect from 1981 until 1987, the provision waiving consideration of the transfer requirement after an initial determination that the employee has satisfied the transfer requirement does not satisfy plaintiff's burden to show that his supervisory positions from 1986 to 1991 and again from 1994 to April 1, 2001 are secondary positions. *See, e.g.*, 5 C.F.R. § 931.903(c)-(d) (1987). The provisions in effect from 1981 until 1987 exempted an employee from the obligation to prove that he or she met certain transfer requirements, but the transfer requirements described under the former provisions from 1981 to 1987 are distinct from the transfer requirement imposed after 1987, which the plaintiff is obligated to meet in the present case. In addition, for the same reasons which apply to the discussion regarding occupation of a primary position, the doctrines of judicial estoppel and collateral estoppel do not preclude the reconsideration of whether Mr. Crowley continuously occupied secondary positions after his transfer from a primary position.

1. Secondary Group Supervisor Position

In 1986, Mr. Crowley transferred from his primary position to the position of Group Supervisor. Mr. Crowley held the position of Group Supervisor during two time periods after his initial transfer from a primary position until the time period for which he seeks secondary administrative credit, the first from 1986 until 1991 and again from 1994 until April 1, 2001. For both of these time periods, Mr. Crowley must prove that the position of Group Supervisor satisfies the definition of a secondary supervisor position meaning, that he served "as a first-level supervisor of law enforcement officers or firefighters in primary positions . . . ." 5 C.F.R. § 831.902 (2002).

As a Group Supervisor, Mr. Crowley was the first-level supervisor for a group composed of DEA Diversion Investigators. To determine whether the Diversion Investigators he supervised were law enforcement officers in primary positions, the definition set forth in the plainly worded statute and the regulations must be applied because the language of the statute is clear. In addition, as undertaken above, the court discusses the application of the Watson and Bingaman factors to plaintiff's case to determine whether those individuals Mr. Crowley supervised were performing Law Enforcement Officer duties. Thus, the Diversion Investigators Mr. Crowley supervised occupied primary positions if their primary duties were the "investigation, apprehension, or detention" of criminals or suspects. *See* 5 U.S.C. § 8331(20) (2000); 5 C.F.R. § 831.902 (2002).

As discussed above, the basic reasons for the existence of the Diversion Investigator position in which Mr. Crowley served were to conduct criminal investigations of individuals suspected of illegally diverting controlled drugs into the illicit drug market. A number of Diversion Investigators who were supervised by Mr. Crowley testified at the trial. Edward Sullivan, Edward Harrington, Kathi Murphy and JoAnn Masar all testified at the trial and were all Diversion Investigators working under Mr. Crowley from 1986 through 1991. Kathi Murphy and JoAnn Masar also worked under Mr. Crowley during his second tour as a Group Supervisor, from October 1994 through April 1, 2001. Regarding the duties of the Diversion Investigators Mr. Crowley supervised, Mr. Crowley testified that the Diversion Investigators in his group performed criminal investigations about eighty to eighty-five percent of their time. Mr. Sullivan confirmed Mr. Crowley's testimony, stating that he worked eighty-five percent of his time performing criminal investigations, except for four years he spent in Rhode Island working on two organized crime cases, in which he did not perform any cyclic investigations. Mr. Harrington estimated that he spent eighty percent of his

time on criminal investigations. With regard to the second period in which Mr. Crowley was a Group Supervisor, Ms. Masar testified that in 2000, she performed only one cyclic investigation that took two days. She spent the rest of her time working on criminal investigations.

By describing the tasks they performed in specific cases, Mr. Sullivan, Mr. Harrington, Ms. Murphy and Ms. Masar all testified that they performed similar tasks as part of the investigations to which they were assigned as did Mr. Crowley. They developed witnesses, gathered evidence, submitted evidence to Grand Juries, developed informants, conducted surveillance, conducted administrative searches and participated in criminal searches of various premises. The evidence in the record demonstrates that the Diversion Investigators supervised by Mr. Crowley spent a majority of time investigating and aiding in the apprehension of criminals or suspected criminals, and that, therefore, they were law enforcement officers in primary positions. Thus, the court finds that as a group supervisor from 1986 to 1991 and from 1994 to April 1, 2001, Mr. Crowley occupied a secondary supervisory position, within the meaning of 5 C.F.R. § 831.902 (2002).

Although the court finds that the plaintiff's satisfaction of the statutory and regulatory standard is sufficient for proving that his tours as a group supervisor were secondary supervisory positions, the court also considers whether the Diversion Investigators supervised by Mr. Crowley were law enforcement officers in primary positions under the factors discussed in *Hall*, *Watson* and *Bingaman*. The Diversion Investigators working under Mr. Crowley's supervision performed similar duties and had similar responsibilities to Mr. Crowley when he occupied the Diversion Investigator position.

First, the Diversion Investigators supervised by Mr. Crowley worked significantly more than forty hours a week, including weekends. During his investigation of the Dr. Robert Carson case, Mr. Sullivan testified that he worked "late into the night

. . . ." Mr. Crowe, a Special Agent who worked with Janet Gardner, a Diversion Investigator working under Mr. Crowley, testified that while they were investigating the Cumberland Prescription Center case, Ms. Gardner and Mr. Crowe performed surveillance "until 8:00, 8:30, maybe nine o'clock upon occasion, and then she would return home. It was my understanding that she would compile and work on her notes when she got home." Mr. Crowe estimated that Ms. Gardner worked ten to twelve hour days on the case. Ms. Masar also testified that the occasion to work long hours without a break: "occurs whenever you have to serve, when, when you're executing a warrant of any type because you can't just stop. It occurs when you're traveling long distances, like we do frequently, because of the area that we cover."

The Diversion Investigators under Mr. Crowley's supervision also had frequent, direct contact with suspected criminals. During the Dr. Robert Carson investigation, Mr. Sullivan interviewed Dr. Carson, Joyce Lori and John Lori, all of who were suspected of illegally selling controlled substances. In addition, Mr. Sullivan also interviewed a number of persons with associations to motorcycle gangs who were involved with "hard" drugs, such as heroin, cocaine and LSD. In the Cumberland Prescription center investigation, Mr. Harrington testified that he interviewed approximately one hundred people who were suspected of improperly acquiring prescriptions. Ms. Masar testified that while she was investigating the High Street Gang case, she interviewed a number of people who "had prior records of, of drug offenses or they were known to the local departments as being involved in drug activity." Furthermore, the Diversion Investigators in Mr. Crowley's group gave Miranda warnings, which they could read from a card containing the Miranda warnings that was provided to them by DEA, when necessary during interrogations. Ms. Murphy testified that:

> On one occasion, I gave Miranda warnings to an interview-to a, to a person who was incarcerated while I

was interviewing him. There were other instances, during criminal search warrants or administrative inspection warrants, where I would give Miranda warnings prior to any information coming out that may, may or shouldn't have at the time.

Moreover, the Diversion Investigators Mr. Crowley supervised were on call twenty-four hours a day. Ms. Masar testified that if she received a call after hours from someone who was working on a case with her she would answer it, and respond, if necessary. More specifically, while Ms. Masar was working on the Operation Ox case, she would respond to any pharmacy burglary that occurred, mostly late at night and on weekends. While Mr. Crowe was working on the Cumberland Prescription case with Ms. Gardner, she was on call to him twenty-four hours a day and he would contact her at home and at night regarding the case.

The Diversion Investigators under Mr. Crowley performed physical tasks. When executing searches, Diversion Investigators were required to carry sometimes heavy boxes and other evidence. Mr. Harrington testified that his Diversion Investigator training, an eight week program in Quantico, Virginia, contained a physical component of calisthenics and running. Although Mr. Harrington was not required to take a physical training test upon graduation, he testified that his training included a physical component, indicating recognition by the DEA that the job which he was being trained for, the Diversion Investigator position, also contained a physical component. The Diversion Investigators who worked under Mr. Crowley also faced physical hardship in terms of the geographic distances and attendant hours included as part of their duties. The Boston regional office covered six New England states: Maine, New Hampshire, Vermont, Rhode Island, Connecticut and Massachusetts. Ms. Masar testified that she was the primary investigator responsible for the entire state of Maine for a period of time. Ms. Masar, who

lived in southern Maine, often had to travel 200 miles to northern Maine to investigate cases.

Finally, despite the Miller and Mullen memorandum, the Diversion Investigators supervised by Mr. Crowley performed hazardous duty as also discussed above. For example, Mr. Sullivan, who, through the bulk of his testimony, testified in a straightforward and composed manner, became unsettled when recounting a particular situation:

> We had just finished up a case in Saugus, Mass . . . American Discount. I was followed home one night. I lived in New Hampshire. I was followed down 495 for about 25 miles. I was followed up 125. I was getting really scared. I crossed over into New Hampshire, and there was a big car that was following me with four individuals right after I left that particular location in Saugus. And I turned around in a parking lot, and they turned into the parking lot, and I went, they came right for me in the car, and I got the plate number, and I just sped out of there and went home. I immediately called Jack [Crowley], and I had the plate number, and Jack notified George Festa, the SAC [Special Agent in Charge], and my wife was pretty upset. She was crying. She wanted to know why I was pretty upset. I was shook, shook up. I thought someone was going to try to tune me up or do, do me or something. You know, I mean, I didn't know. You know, you get kind of paranoid, you know, after a while because a lot of times, you're not armed. Okay? And sometimes they think you are, and it's the scariest place to be when you're unarmed, and everyone else is armed, and they put you in these situations. Okay? It's probably the most dangerous job there is when it comes to that because they don't know that you're not armed.

Ms. Masar testified that she considered her job dangerous: "because we deal with criminals and drug addicts and people

that we are targeting for criminal sanctions or civil sanctions. People that could be spending time in jail that have never gone to jail before." Ms. Masar testified that, for a period of several weeks, she was a target of counter-surveillance. She was followed, several vehicles were parked outside of her house and other vehicles drove by her home and the persons inside the vehicles were looking in her windows. As a result, Ms. Masar had extra police patrols from the local police department because she was afraid for her young daughter.

The evidence shows that, similar to Mr. Crowley's service as a Diversion Investigator, Diversion Investigators supervised by Mr. Crowley more frequently pursued criminals, as opposed to guarding life or property, performed physical tasks that were demanding and were exposed to dangerous situations, despite the restrictions apparently imposed for their safety. Furthermore, the Diversion Investigators in Mr. Crowley's group had frequent direct contact with criminals when interviewing witnesses, developing informants, and aiding in the apprehension of the criminal targets who were illegally diverting controlled drugs. These Diversion Investigators also interrogated witnesses and suspects and gave Miranda warnings when appropriate. Diversion Investigators worked a substantial amount of hours to complete their investigations and were unable to take breaks when conducting long surveillances or extensive searches. These Diversion Investigators made themselves available to their supervisors, witnesses, and informants, as the case required, twenty-four hours a day. Although Diversion Investigators have never been authorized to carry a firearm and have not been subject to an early mandatory retirement age or a youthful, maximum entry age, these factors are not dispositive for determining whether the Diversion Investigators supervised by Mr. Crowley occupied primary positions. In considering the evidence as a whole, even under the Watson and the Bingaman factors, the Diversion Investigators in Mr. Crowley's group performed law enforcement work, using the full range of

criminal investigative tools to investigate and aid in the apprehension of criminals and suspects involved in illegal drug traffic.

2. Secondary Administrative Position—Staff Coordinator

From 1991 until 1994, Mr. Crowley occupied the position of Staff Coordinator in the Office of Diversion at DEA headquarters in Arlington, Virginia. Under the second transfer requirement of continuous employment in secondary positions, Mr. Crowley must prove that his position as Staff Coordinator satisfies the definition of a secondary position under 5 C.F.R. § 831.902 (2002). A secondary position must be either administrative or supervisory. The plaintiff alleges that Mr. Crowley's position as Staff Coordinator qualifies as a secondary administrative position. Under the applicable regulations, a secondary administrative position is "an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a prerequisite." 5 C.F.R. § 831.902 (2002). To prove the prerequisite requirement, Mr. Crowley must demonstrate that: (1) as a Diversion Investigator, he had experience in a primary Law Enforcement Officer position; and (2) that such experience was a mandatory prerequisite of his secondary administrative position. Regarding Mr. Crowley's request for administrative credit, defendant argues that "Mr. Crowley has failed to satisfy his burden of proving that LEO experience was a prerequisite for his Domestic Drug Unit position as Staff Coordinator just as he failed to meet his burden for his subsequent position with the International Drug Unit."[27]

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[27] Although the defendant treats the time Mr. Crowley spent as a Staff Coordinator in the Domestic Drug Unit separate from the time he spent as a Staff Coordinator in the International Drug Unit, his position, Staff Coordinator, and job description, supervising investigations in the field, remained the same throughout that time. Ms. Fulmore testified that if

Mr. Crowley was selected for the position as a Staff Coordinator by the DEA Career Board as part of a policy by which field supervisors would rotate into positions at headquarters as Staff Coordinators. Thus, DEA was drawing upon its field supervisors, who had experience in criminal investigations, like Mr. Crowley, to fill the Staff Coordinator positions. The policy indicates that DEA was filing the position with its most experienced personnel, rather than from the outside, and choosing personnel with criminal investigative experience. As Staff Coordinator, Mr. Crowley monitored field offices and coordinated their investigative activities with headquarters and between the offices. Ms. Brophy testified that the Staff Coordinator position could not have been performed if the person did not have criminal investigative experience. As noted above, Ms. Brophy testified that a staff coordinator was required to give advice to "a relatively inexperienced field investigator" and that specific expertise was needed to describe how an undercover buy from a doctor for a controlled substance should take place or what type of evidence is germane to a specific case.

Furthermore, the position description for Staff Coordinator lists several duties requiring extensive knowledge of the activities that Diversion Investigators perform in the field. Specifically, Staff Coordinators are expected to prepare "basic and advanced training material, and technical advice to the field." The position description for a Staff Coordinator states:

> Thorough knowledge of these Headquarters programs as well as field investigative activity involving these areas is required.
>
> * * *

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there was no change in the position description, there was no change in the position. In moving from the Domestic Drug Unit to the International Unit, Mr. Crowley's duties remained the same, the geographic focus was the only element that changed.

> The incumbent of this position must possess a thorough knowledge of law enforcement as it pertains to the diversion of legitimately produced controlled substances and is required to have an in-depth knowledge and experience in all aspects of diversion control.

Finally, in a letter in support of Mr. Crowley's application for Law Enforcement Officer credit submitted on September 23, 1993, Mr. Haislip stated:

> A primary selection criteria for [the] position [of Staff Coordinator] is extensive past experience in successfully conducting and supervising criminal investigations. In fact, Mr. Crowley would not have been selected for the position without his extensive experience as a law enforcement officer. The position of Staff Coordinator at Headquarters requires the incumbent to continuously apply the investigative knowledge and techniques learned previously in criminal investigations.

Because Mr. Crowley's position as a Diversion Investigator qualifies as law enforcement officer experience, and because the evidence demonstrates that "in-depth knowledge and experience in all aspects of diversion control" were required to perform the Staff Coordinator position, the court finds that law enforcement experience was a mandatory prerequisite to the position of Staff Coordinator.

Plaintiff claims law enforcement officer credit to the date of his retirement. There was little testimony, however, on the period from April 1, 2001 through the trial during which Mr. Crowley was a "Special Assistant." Furthermore, there is no evidence in the record, nor is the period discussed in plaintiff's briefs. Therefore, the court finds that Mr. Crowley is not entitled to law enforcement credit from April 1, 2001, to his retirement, October 1, 2001.

Based on all the evidence presented and the discussion set forth above, the court finds that Mr. Crowley is entitled to

Law Enforcement Officer status during the time period he served in the Staff Coordinator position and the Group Supervisor position and for which he has not been credited from October 1, 1991 until April 1, 2001. Consequently, the plaintiff is entitled to certain benefits flowing from his Law Enforcement Officer status from October 1, 1991 until April 1, 2001.

D. FLEPRA Section 403

In a motion to dismiss, the defendant earlier argued to this court that only one of the test plaintiffs, John Partridge, held a colorable claim for benefits under FLEPRA section 403, 5 U.S.C. § 5305 note (2000). *Hannon v. United States*, 48 Fed. Cl. 15, 28 (2000). This court found that "since plaintiff John Partridge is the only party seeking FLEPRA section 403 (5 U.S.C. § 5305 note) compensation, the parties are in agreement on this issue, thus rendering the issue moot," for all plaintiff's before the court other than Mr. Partridge. *Id.* According to plaintiff's brief, however, Mr. Crowley also seeks the special rate of pay afforded to Law Enforcement Officer's pursuant to FLEPRA section 403. FLEPRA section 403, the effective date of which was the first applicable pay period beginning on or after January 1, 1992, does not provide for special rates of pay for Law Enforcement Officers in GS grades at or above GS-10. The defendant states, that "it is undisputed that Mr. Crowley did not serve in a position below GS-10 at any time after the effective date of FLEPRA § 403." The plaintiff has not asserted, in its initial brief or its reply brief, that, following the effective date of FLEPRA section 403, Mr. Crowley occupied a position lower than the grade of GS-10. Nor is such a statement present in the evidence. Thus, plaintiff is not entitled to the benefits pursuant to FLEPRA section 403.

E. FLEPRA Section 404

The plaintiff argues that he is entitled to an increase in his basic pay based on FLEPRA section 404 (5 U.S.C. § 5305 note (2002). FLEPRA section 404(b)(1) states:

> Except as provided in subsection (a), effective on the first day of the first applicable pay period beginning on or after January 1, 1992, each law enforcement officer whose post of duty is in one of the following areas shall receive an adjustment, which shall be a percentage of the officer's rate of basic pay, as follows:
>
> Boston-Lawrence-Salem, MA-NH Consolidated Metropolitan Statistical Area . . . 16%
>
> * * *
>
> Washington-Baltimore DC-MD-VA-WV Consolidated Metropolitan Statistical Area . . . 4%

The court has found that Mr. Crowley served in a Law Enforcement Officer position from October 1, 1991 until April 1, 2001. The defendant has not argued, assuming Mr. Crowley met the definition of a Law Enforcement Officer, that he is not qualified to receive locality pay under FLEPRA section 404. Therefore, Mr. Crowley is entitled to locality pay from the effective date of FLEPRA section 404, the first applicable pay period beginning on or after January 1, 1992 until April 1, 2001. From January 1, 1992, until October 30, 1994, Mr. Crowley worked at DEA headquarters in the Washington, D.C. metropolitan area and is, therefore, entitled to a four percent increase in his basic pay during that period. From October 31, 1994 until April 1, 2001, Mr. Crowley served in the Boston, Massachusetts metropolitan area and is entitled to a sixteen percent increase in his basic pay during that period.

E. Overtime Pay

The plaintiff claims that he is entitled to overtime pay pursuant to 5 U.S.C. § 5542(a)(4) (2000), but does not request overtime pay prior to August 2, 1985 because of the six-year statute of limitations. 5 U.S.C. § 5542(a) provides for premium pay "for full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek . . . in excess of 8 hours in a day, performed by an employee . . . ." Law enforcement officers are eligible for this overtime pay and receive an amount equal to the greater of (A) one and one-half times the minimum hourly rate of basic pay for GS-10; or (B) the hourly rate of basic pay of the employee. *See* 5 U.S.C. § 5542(a)(4).

By its terms, the statute establishing overtime pay permits overtime pay only for "hours of work officially ordered or approved." 5 U.S.C. § 5542(a) (2000). The applicable regulations require that no overtime may be ordered or approved except by an officer or employee to whom such authority has been specifically delegated by the head of the department or agency. *See* 5 C.F.R. § 550.111(c) (2002). In determining whether overtime work has been "officially ordered or approved," a written directive or order to perform work beyond the forty hour work week satisfies the statutory standard and is considered "officially ordered or approved." *See Baylor v. United States*, 198 Ct. Cl. 331, 349 (1972) ("Although there is no evidence that any of the plaintiff guard privates were specifically 'ordered' in so many words to report to his assigned post 'a few minutes early,' it is apparent from the April 20, 1960 general directive to 'GSA GUARDS' mentioned hereinbefore that at least on one occasion each guard was instructed in writing that he 'should' do so . . . It appears that [the guards] reasonably understood and considered the instruction to be a command that obligated and required them to report to their assigned posts of duty a few minutes before

the specified hour of their scheduled shifts."); *Bates v. United States*, 196 Ct. Cl. 362, 367, 371, 450 F.2d 886, 889, 891 (1971) (finding that the regulations and instructions requiring the employees to "report in uniform 15 minutes before the scheduled start of their shifts" constituted an order and approval of overtime work); *Byrnes v. United States*, 163 Ct. Cl. 167, 171, 174, 330 F.2d 986, 988, 990 (1963) (holding that a written directive including a statement that "it is expected that you will perform without extra compensation any overtime that may be necessary to make good cases and achieve effective results in our enforcement work" constituted an explicit expectation that amounted to "inducement and compulsion"); *Farley v. United States*, 131 Ct. Cl. 776, 780, 127 F. Supp. 562, 564 (1955) (holding that an employee working pursuant to a "regulation specifically requiring that the officer remain on duty" is entitled to overtime pay for the time she was on duty in excess of forty hours per week).

In cases in which there is no explicit directive or order requiring work outside the forty hour week, overtime work may be considered "officially ordered or approved" if the employee was induced to perform overtime. *See Adams v. United States*, 162 Ct. Cl. 766, 781 (1963) (finding that the employing agency knew and approved the overtime work and that "the evidence makes it abundantly clear that the [agency], as an entity, induced the overtime, and that the withholding of written authorization or approval was done overtly and as a matter of departmental policy"); *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986) (finding that "plaintiff was clearly induced to put in overtime hours" because "he was directly ordered by his Command to increase days and hours of the Special Service facilities at the base, yet at the same time suffered a steady loss of staff to help him keep the facilities open and running."). In *Anderson v. United States*, 136 Ct. Cl. 365 (1956), the Court of Claims considered a case in which the employing agency advised that an administrative work week would be limited to forty hours a week and that

overtime would only be approved "under most unusual circumstances." *Id.* at 387. Despite the agency's announcement, the agency encouraged "voluntary overtime" and instructed inspectors to record their actual hours worked on daily reports which were used to rate and recommend the inspectors for promotions. *Id.* at 391-92. The Anderson court found that "every administrative device and the tone and content of instructions were so cast as to imply (if not overtly to state)" that the inspectors could not effectively and acceptably perform their work within forty hours per week. *Id.* at 393.

In contrast, in *Albright v. United States*, 161 Ct. Cl. 356 (1963), the Court of Claims found that "a 'tacit expectation' is not equivalent to the statutory requirement of 'official order or approval.'" *Id.* at 361. In Albright, although plaintiffs were required by regulation "to report 15 minutes before their tour of duty began, . . . actually, they reported at least 20 minutes before." *Id.* at 358. There was no written order requiring the plaintiffs to report five minutes early, but it was tacitly understood between the plaintiffs and their supervisors that they should be available for duty twenty minutes before their scheduled shift. *Id.* at 361.

The evidence shows that Mr. Crowley worked more than forty hours per week throughout his career with DEA, including evenings and weekends, and did not receive any overtime pay for the hours he worked beyond the forty hour work week until April of 1995. In April of 1995, Mr. Crowley began receiving overtime, but it did not compensate him for the total amount he claims he worked. Mr. Crowley testified that he did not record the amount of overtime he was working because:

> The overtime budget for the rest of the employees was very, very small, and if I, if I wrote down the hours for overtime, I wouldn't be paid anyways. So, it was, it was discouraged. I was told not to do it, and the same would

> hold true for compensatory time. There was, I was told there was no such thing.

In his reply brief, the plaintiff admits: "To be sure, Mr. Crowley's documentation of his overtime hours could be better." Because he was directed to keep his biweekly sheets consistent with his time and attendance sheets, Mr. Crowley claims that his biweekly sheets do not reflect the actual total hours he worked. Mr. Crowley has offered no written documentation of the overtime hours he worked, instead relying on his testimony that, on average, he worked ten hours of overtime a week. Mr. Crowley did not offer any testimony that he was directed or ordered to work overtime for which he was not compensated. Furthermore, the plaintiff has not presented any evidence that he was ever given an order or directive throughout his career in DEA to work beyond the forty hour work week. There is also no evidence showing that the plaintiff would have received negative feedback if he had not worked overtime. Thus, the evidence shows that overtime work hours were not officially ordered or approved by DEA. The court, therefore, finds that the plaintiff is not entitled to overtime pay pursuant to 5 U.S.C. § 5542 (2000).

F. Administratively Uncontrollable Overtime (AUO) Pay

As an alternative to overtime pay, Mr. Crowley requests AUO pay, also from August 2, 1985 to October 1, 2001, as restricted by the statute of limitations. AUO is permitted under 5 U.S.C. § 5545(c)(2) (2000), which provides:

> (c) The head of an agency, with the approval of the Office of Personnel Management, may provide that—
>
> * * *
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being re-

> sponsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

The applicable regulations governing the administration of AUO pay clarify the criteria for eligibility for AUO. The regulations at 5 C.F.R. § 550.153(a) (2002) describe the situations in which overtime is administratively uncontrollable:

> The hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required.

Although the evidence shows that the plaintiff performed duties which required such overtime work, including interviewing witnesses, the plaintiff has presented no evidence which demonstrates that at least some of this overtime could not have been controlled by rescheduling the hours of duty to incorporate shifts during different times of the day when witnesses could be available. Regarding situations in which Mr. Crowley worked overtime to review records during an audit, or conduct extensive searches, the plaintiff has not shown that some of this overtime work could not have been alleviated by hiring additional personnel. In fact, much of the overtime Mr. Crowley worked may have been due to a shortage of Diversion Investigators. Mr. Coleman testified that he

never missed an opportunity to request additional Diversion Investigators because he was understaffed. Furthermore, Mr. Johnson testified that he was put in a position in which he had to assign only one Diversion Investigator to each state within the region and that the situation could have been controlled better if he had more people. Moreover, the plaintiff has not demonstrated that providing compensatory time would not have been effective at offsetting the overtime hours required.

An additional requirement of 5 C.F.R. § 550.153 (2002) for receiving AUO provides that:

> An employee is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:
>
> (1) A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work.
>
> (2) The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.
>
> (3) There must be a definite basis for anticipating that the irregular or occasional overtime work will continue over an appropriate period with a duration and frequency sufficient to meet the minimum requirements under paragraphs [(1) and (2)] of this section.

5 C.F.R. § 550.153(b)(1)-(3). Mr. Crowley estimated that he worked, on average, ten hours of overtime a week over his tenure at DEA. To the extent that Mr. Crowley performed overtime work, Mr. Crowley has not specified the number of overtime hours which he alleges fit the administratively uncontrollable category. Thus, the plaintiff has not shown that he meets the duration and frequency requirements of 5 C.F.R. § 550.153(b). Because the plaintiff carries the burden to prove that he is entitled to AUO and because the plaintiff has not demonstrated that the overtime he worked was adminis-

tratively uncontrollable, the court finds that the plaintiff is not entitled to AUO.

G. Availability Pay

As an alternative to either overtime premium pay and AUO, the plaintiff argues that he is entitled to availability pay pursuant to 5 U.S.C. § 5545a (2000), beginning in 1994 when the availability pay statute was enacted, to October 1, 2001. The statute at 5 U.S.C. § 5545a establishes the criteria for eligibility for availability pay as follows:

> (b) The purpose of this section is to provide premium pay to criminal investigators to ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour work week based on the needs of the employing agency.
>
> (c) Each criminal investigator shall be paid availability pay as provided under this section. Availability pay shall be paid to ensure the availability of the investigator for unscheduled duty. The investigator is generally responsible for recognizing, without supervision, circumstances which require the investigator to be on duty or be available for unscheduled duty based on the needs of the agency. Availability pay provided to the criminal investigator for such unscheduled duty shall be paid instead of premium pay provided by other provisions of this subchapter . . .

5 U.S.C. § 5545a. To qualify for availability pay, the employee must be an Law Enforcement Officer. *See* 5 U.S.C. § 5545a(a)(2). In addition, an employee must meet the requirements of the applicable regulations. The regulation at 5 C.F.R. § 550.103 (2002) establishes the definition of a "criminal investigator" as "a law enforcement officer as defined in 5 U.S.C. § 5541(3)[28] and this section—(1) Whose position is

[28] 5 U.S.C. § 5541(3) incorporates the definition of a "law enforcement officer" set forth in 5 U.S.C. § 8331(20) and analyzed in the discussion above.

properly classified under the GS-1811 or GS-1812 series in the General Schedule classification system based on OPM classification standards . . . ."[29] The defendant has asserted, and the plaintiff has not denied, that Mr. Crowley has been classified as either in the GS-1801 or the GS-1810 series, but not in the GS-1811 or the GS-1812 series. Thus, by the plain terms of the regulation, the plaintiff does not qualify for availability pay.

Plaintiff argues that:

> Nowhere in the statute does Congress purport to limit availability pay to investigators in the GS-1811 or GS-1810 series. Rather, Congress's explicit definition of a criminal investigator incorporates the definitions of 5 U.S.C. §§ 8331(20) and 8401(17)[30] and limits it to those law enforcement officers involved in criminal investigations rather than apprehension or detention.

Although the availability pay statute does incorporate the definition of an Law Enforcement Officer that is set forth in 5 U.S.C. § 8331(20) (2000), the statute does not state that Law Enforcement Officer status is the only requirement necessary for entitlement to availability pay. Additional requirements for entitlement to availability pay were promulgated in the applicable regulations, and these regulations specifically do not support plaintiff's interpretation of the criteria for availability pay. The definition of a "criminal investigator" set forth in 5 C.F.R. § 550.103 (2002) establishes a discreet list

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[29] The definition of a "criminal investigator" under 5 C.F.R. § 550.103 lists several other positions that qualify as a "criminal investigator" position. The plaintiff does not claim that he occupies one of those other positions.

[30] The definition of an Law Enforcement Officer established under 5 U.S.C. § 8401(17) (2000) applies to employees seeking benefits under the Federal Employees' Retirement System, which does not apply in the present case because Mr. Crowley's benefits would arise under the Civil Service Retirement System.

of positions which meet the "criminal investigator" requirement, which also must be met in addition to the requirements under 5 U.S.C. § 5545a.

Plaintiff next argues that "he meets the definition of a criminal investigator under 5 U.S.C. § 5545a(a)(2) [(2000)] and, thus, that his position properly should be classified as a GS-1811." Although the court has found that the plaintiff has performed Law Enforcement Officer work, the regulation does not permit the disbursement of availability pay to employees who have not been classified as a GS-1811. The regulation expressly requires that for availability pay, the employee must be classified as a GS-1811 and that this classification must have been properly determined. Because the plaintiff does not meet the regulatory definition of a "criminal investigator" for the purposes of entitlement to availability pay, the court finds that the plaintiff is not entitled to availability pay.

CONCLUSION

For the reasons set forth above, the court finds that Mr. Crowley qualifies for Law Enforcement Officer credit from October 1, 1991 to April 1, 2001. As an Law Enforcement Officer, Mr. Crowley is entitled to benefits flowing from FLEPRA section 404 at a rate of four percent from the first applicable pay period following January 1, 1992 to October 30, 1994 and at a rate of sixteen percent from October 31, 1994 to April 1, 2001. Mr. Crowley, however, has not met his burden of proving that he is entitled to overtime pay under 5 U.S.C. § 5542 (2000), AUO pursuant to 5 U.S.C. § 5545(c)(2), or availability pay under 5 U.S.C. § 5545a.

IT IS SO ORDERED.

MARIAN BLANK HORN, *Judge*

APPENDIX F

UNITED STATES COURT OF FEDERAL CLAIMS

[Filed October 6, 2000]

Case Nos. 91-1334C, *et al.*

JAMES T. HANNON, *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant.

OPINION

HORN, *Judge*.

The above captioned cases come before the court on the defendant's renewed motion for partial dismissal for lack of jurisdiction and/or failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(4) of the Rules of the United States Court of Federal Claims (RCFC). In the motion, the defendant's primary arguments are that the claims of the plaintiffs in these cases fall within the exclusive jurisdiction of the Merit Systems Protection Board (MSPB),[1] and that the plaintiffs have failed to exhaust available administrative remedies. The defendant's renewed motion raises four additional arguments, which are addressed later in this opinion.

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[1] The court notes that plaintiffs Hannon and Townsend have pending appeals from MSPB decisions on retirement credit claims in the United States Court of Appeals for the Federal Circuit. The Circuit court has the Hannon case (Appeal No. 99-3354) under advisement after oral argument, and briefs and an appendix have been filed in the Townsend case (Appeal No. 00-3014).

FACTS

The plaintiffs in these cases are 260 Diversion Investigators (DIs), employed by the Drug Enforcement Administration (DEA), which is an agency within the Department of Justice (DOJ). The plaintiffs are classified as GS/GM-1810 and range from grade five through grade sixteen on the federal pay scale. The plaintiffs allege that the decision to deny them overtime compensation and benefits in accordance with the Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101 -509, §§ 401-412, 104 Stat. 1389, 1465-69 (FLEPRA),[2] while providing such compensation to special agents, GS-1811 Criminal Investigators, also employed by the DEA, is arbitrary, capricious, and not in accordance with the law. The plaintiffs seek relief in this court pursuant to 28 U.S.C. § 1491 (1994 & Supp. II 1998), and the Back Pay Act, 5 U.S.C. § 5596 (1994), because of the defendant's refusal to pay them premium and overtime pay, as allegedly required pursuant to FLEPRA, and administratively uncontrollable overtime (AUO), as provided by 5 U.S.C. § 5545(c) (1994). The plaintiffs argue that under the applicable statutes and DOJ orders, they are "law enforcement officers" (LEOs) entitled to receive the same compensation as other DEA LEOs, including special agents, based on the actual work performed by them during the course of their employment.

The parties have jointly stipulated the central issues in these cases to be: "whether the duties performed by the plaintiffs during the periods covered by this lawsuit meet the definition of 'law enforcement officer' within the meaning of 5 U.S.C. § 5541(3)(A), 5 U.S.C. § 8331(20) and 5 U.S.C.

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[2] Sections 401 -407 and 412 of FLEPRA are found at 5 U.S.C. § 5305 note (1994). Section 408 is codified at 5 U.S.C. §§ 4521 -4523, 6401 (1994); Section 409 at 5 U.S.C. § 8335 (1994) and 5 U.S.C. § 8425 (1994); Section 410 at 5 U.S.C. §§ 5542, 5547 (1994) (repealed in part by Pub. L. No. 102-378, § 2(43) (Oct. 2, 1992)); and Section 411 at 5 U.S.C. § 5541 (1994).

§ 8401(17) so as to qualify them for the benefits provided under the applicable provisions of the Federal Law Enforcement Pay Reform Act (PL 101-509) ('FLEPRA') retroactive to the effective date of FLEPRA," and "whether plaintiffs are entitled to pay under 5 U.S.C. § 5545 for administratively uncontrollable overtime service for periods prior to the effective date of 'FLEPRA.'"

Three individual cases have been selected by the parties to serve as the test plaintiffs for this matter: *John W. Partridge v. United States*, Case No. 94-819C, *John D. Crowley v. United States*, Case No. 94-711C, and *John Buckley v. United States*, Case No. 92-469C. Buckley is one of the original nine plaintiffs who filed a complaint in this court. The test cases were selected as they cover three categories of plaintiffs: (1) Diversion Investigators, (2) Diversion Group Supervisors, and (3) those from the above two categories who have transferred to administrative positions. The test cases also encompass each of the four types of claims in this action: (1) qualification for a special rate of pay if he or she was an employee at grades GS-3 through GS-10 pursuant to FLEPRA section 403 (5 U.S.C. § 5305 note); (2) qualification for a special rate of pay if he or she was posted for duty in one of eight specified metropolitan areas pursuant to FLEPRA section 404 (5 U.S.C. § 5305 note); (3) eligibility for premium pay for AUO derived from working scheduled overtime work compensated at the greater of 150 percent of the GS-10 hourly pay rate, or their own hourly pay rates, pursuant to FLEPRA section 410 (5 U.S.C. §§ 5542, 5547); and (4) eligibility for relocation bonuses for jobs that are difficult to fill (within the meaning of 5 U.S.C. § 5753 (1994)), up to a maximum of $15,000.00, for any LEO earning less than $60,000.00 annually at the time of relocation, pursuant to FLEPRA section 407 (5 U.S.C. § 5305 note). In addition, the test cases represent plaintiffs from DEA offices in three different geographical regions (Los Angeles, California, Boston, Massachusetts, and Arlington,

Virginia). The parties concur that the test cases represent the entire universe of plaintiffs and their claims.

At a February 24, 1999 status conference, the court ordered the parties to prepare for trial of the three test cases. The court also allowed the defendant to resubmit its earlier motion to dismiss. That motion had been stayed pending the issuance of the two final MSPB decisions on whether two of the nine plaintiffs who had appealed the agency's final decision would be eligible for LEO retirement credit under the Civil Service Retirement System (CSRS), pursuant to 5 U.S.C. §§ 8331(20), 8336(c) (1994). As the MSPB decisions were still pending at the time of the status conference and the parties were preparing for trial on the three test cases, the court allowed the defendant to renew its motion to dismiss.

DEA's predecessor, the Bureau of Narcotics and Dangerous Drugs (BNDD) established the Diversion Control program in 1971, following passage of the Controlled Substance Act of 1970 (CSA). See 21 U.S.C. §§ 801 *et seq.* (1994). One of the purposes of the CSA was to combat the diversion of controlled substances to addicts and drug dealers by doctors, pharmacists, manufacturers, and distributors. It established requirements for the use, storage, and distribution of controlled substances, and it made the diversion of drugs violations of the law punishable under the criminal statutes of the United States. Duties of DIs include assuring compliance with the requirements created by the CSA and investigating violations of criminal laws with respect to diversion of drugs into illegal channels.

Plaintiff John Buckley began working with BNDD in April 1972. Mr. Buckley worked in New York City initially from 1972 to 1983. He was an investigator from April 1972 until October 1979, at which time he was promoted into the position of a group supervisor. Mr. Buckley was a group supervisor until March 1983 when he was transferred to DEA headquarters in Arlington, Virginia, where he worked as a

staff coordinator for the Office of Diversion. He returned to New York to work as a supervisor of DIs from August 1985 until October 1988 when he transferred back to the headquarters as the deputy chief of diversion operations. Mr. Buckley remained in that position until mid-1989 when diversion operations split into drugs and chemicals. Mr. Buckley became the deputy chief in chemical operations and remained in that position until June 30, 1991, when he was transferred to the Office of Inspections. According to the papers filed with the court, Mr. Buckley continues to work at the Office of Inspections as an inspector. Also, according to the parties, Mr. Buckley's retirement benefits arise under the CSRS, pursuant to 5 U.S.C. §§ 8331(20), 8336(c). To date, the Office of Personnel Management (OPM) has credited Mr. Buckley with LEO retirement coverage under 5 U.S.C. §§ 8331(20), 8336(c) for the time period from January 1, 1975 until August 23, 1989.

Plaintiff John Crowley started working with BNDD in 1973 as a DI, assigned to the Boston, Massachusetts office. Mr. Crowley served as a DI until June 16, 1986 when he was promoted to supervisory investigator in the same office. In February 1991, Mr. Crowley was transferred to DEA headquarters in Arlington, Virginia to work in the position of staff coordinator for the Office of Diversion Control. He remained in this position until October 1994. At that time, he was transferred back to Boston and became a supervisory investigator once again. According to the papers filed with the court, Mr. Crowley continues to work as a supervisory investigator in Boston at this time. Also, according to the parties, Mr. Crowley's retirement benefits arise under the CSRS, pursuant to 5 U.S.C. §§ 8331(20), 8336(c). To date, the OPM has credited Mr. Crowley with LEO retirement coverage under 5 U.S.C. §§ 8331(20), 8336(c) for the time period from June 15, 1974 through September 30, 1991.

Plaintiff John Partridge began working as a DI in the Los Angeles office in 1990. According to the papers filed with the court, he continues to work in that position at this time. Mr. Partridge's retirement benefits arise under the Federal Employees Retirement System (FERS), pursuant to 5 U.S.C. §§ 8401(17), 8412(d) (1994). Mr. Partridge has never filed an application for LEO retirement credit. Accordingly, there is no agency decision concerning his coverage as an LEO under FERS.

DIs have not been considered by the DEA as meeting the definition of "law enforcement officer" for premium pay purposes. DIs have not been paid under special pay provisions of FLEPRA and have not received pay for AUO pursuant to 5 U.S.C. § 5545. DEA has adopted the position that once an employee is determined to be entitled to LEO retirement credit for a period of time subject to FLEPRA, that employee will be paid premium pay pursuant to FLEPRA as follows. DEA will pay the employee premium pay pursuant to FLEPRA section 403 (5 U.S.C. § 5305 note) for any period of time, subsequent to the effective date of FLEPRA section 403 (5 U.S.C. § 5305 note), for which it is determined (1) that the employee is entitled to LEO retirement credit, and (2) that the employee satisfies the requirements of FLEPRA section 403 (5 U.S.C. § 5305 note). DEA will pay the employee premium pay pursuant to FLEPRA section 404 (5 U.S.C. § 5305 note) for any period of time, subsequent to the effective date of FLEPRA section 404 (5 U.S.C. § 5305 note), for which it is determined (1) that the employee is entitled to LEO retirement credit, and (2) that the employee satisfies the requirements of FLEPRA section 404 (5 U.S.C. § 5305 note) and 5 C.F.R. §§ 531.301-531.306 (2000[3]). DEA will pay the employee premium pay pursuant to FLEPRA section 410

[3] Subpart C—Special Pay Adjustment for Law Enforcement Officers, was first published at 57 Fed. Reg. 2432 (Jan. 22, 1992) (codified as amended at 5 C.F.R. §§ 531.301-531.305 (1993)).

(5 U.S.C. §§ 5542, 5547) for any period of time, subsequent to the effective date of FLEPRA section 410 (5 U.S.C. §§ 5542, 5547), for which it is determined (1) that the employee is entitled to LEO retirement credit, and (2) that the employee satisfies the requirements of FLEPRA section 410 (5 U.S.C. §§ 5542, 5547). Each DI who meets the requirements for premium pay pursuant to FLEPRA, discussed above, will be paid, retroactively, the amount to which he or she is entitled.

Of the 260 DI's with cases pending in this court, 145 have applied to the DEA and/or the Justice Management Division (JMD), a division of the DOJ, for LEO retirement credit under the CSRS, as provided by 5 U.S.C. §§ 8331(20), 8336(c), and under FERS, as provided by 5 U.S.C. §§ 8401(17), 8412(d). In 1995, the JMD issued final orders on nine of the 145 applications. All nine applications were denied, and each affected DI filed an appeal to the MSPB. The nine cases were consolidated on appeal, and two of the cases, James T. Hannon and Ronald J. Townsend, proceeded to hearing on December 11, 1995. The remaining seven appeals were stayed at the MSPB pending final resolution of the two designated cases. On April 30, 1997, MSPB Administrative Judge Jenkins issued a decision reversing the JMD's denial of LEO retirement credit, concluding that both plaintiffs were entitled to LEO retirement credit under their respective retirement systems, CSRS and FERS. A Petition for Review was filed before the MSPB by the DOJ on June 3, 1997. The MSPB issued a final decision in the case of James T. Hannon on June 11, 1999, reversing the Administrative Judge's decision. The MSPB decision found that Mr. Hannon is not entitled to LEO retirement credit under the CSRS, pursuant to 5 U.S.C. §§ 8331(20), 8336(c), consistent with the JMD's denial of LEO retirement credit. *Hannon v. Department of Justice*, 82 M.S.P.R. 315 (1999). The MSPB issued a final decision in the case of Ronald J. Townsend on August 31, 1999, also reversing the Administrative Judge's decision, similarly holding that he is not entitled to LEO

retirement credit under the FERS, pursuant to 5 U.S.C. §§ 8401(17), 8412(d). *Townsend v. Department of Justice*, 83 M.S.P.R. 427 (1999). James T. Hannon filed an appeal with the United States Court of Appeals for the Federal Circuit on July 20, 1999. See *Hannon v. Department of Justice*, 215 F.3d 1350 (Fed. Cir. 1999) (table) (review reinstated). Ronald J. Townsend filed an appeal with the United States Court of Appeals for the Federal Circuit on October 13, 1999. The two appeals are pending.

In addition to the nine final orders issued by the JMD in 1995, the defendant claims that, since the MSPB's final decision in the case of Ronald J. Townsend, the JMD has issued final orders on 65 additional applications, denying LEO retirement credit in all 65 cases, for a total of 74 cases as of August 20, 2000. The plaintiffs have confirmed that 52 decisions have been issued by the JMD, but state that the remaining 22 decisions JMD claims it has issued have not been confirmed.

DISCUSSION

The defendant has filed a partial motion to dismiss the complaint for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(1) and 12(b)(4). Subject matter jurisdiction may be challenged at any time by the parties, by the court sua sponte, or on appeal. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993), *reh'g denied* (1993); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 998 n.1 (Fed. Cir. 1991). Once jurisdiction is challenged by the court or the opposing party, the plaintiff bears the burden of establishing jurisdiction. See *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936); *Alaska v. United States*, 32 Fed. Cl. 689, 695 (1995), *appeal dismissed*, 86 F.*3d 1178 (Fed. Cir. 1996); Catellus* Dev. Corp. v. United States, 31 Fed. Cl. 399, 404 (1994); *Rocovich v. United States*, 933 F.2d

991, 993 (Fed. Cir. 1991). A plaintiff must establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Alaska v. United States*, 32 Fed. Cl. at 695. When construing the pleadings pursuant to a motion to dismiss, the court should grant the motion "only if 'it appears beyond doubt that plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" *Son Broadcasting, Inc. v. United States*, 42 Fed. Cl. 532, 537 (1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); *see also Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *W.R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988) ("If the[] facts [alleged in the complaint] reveal any possible basis on which the non-movant might prevail, the motion must be denied.").

Pursuant to RCFC 8(a)(1) and the Federal Rules of Civil Procedure 8(a)(1), a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends . . . ." However, "determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997), *reh'g denied* (1997). "Conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983); *see also Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

When deciding on a motion to dismiss based on either lack of subject matter jurisdiction or failure to state a claim, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in

the non-movant's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Conley v. Gibson*, 355 U.S. at 45-46; accord *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *see also Alaska v. United States*, 32 Fed. Cl. at 695; *Highland Falls-Fort Montgomery Cent. School Dist. v. United States*, 48 F.3d 1166, 1167 (Fed. Cir. 1995) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)), *cert. denied*, 516 U.S. 820 (1995); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States*, 873 F.2d at 1416. If a defendant or the court challenges jurisdiction or plaintiff's claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. at 189; *see also Land v. Dollar*, 330 U.S. 731, 735 n.4, 91 L. Ed. 1209, 67 S. Ct. 1009 (1947); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d at 747; *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. at 404-05. When considering a motion to dismiss, the court may examine relevant evidence in order to resolve any disputes as to the truth of the jurisdictional facts alleged in the complaint. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d at 747; *see also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993), cert. denied sub nom. *Cedars-Sinai Med. Ctr. v. O'Leary*, 512 U.S. 1235 (1994) ("In establishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony.").

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C. § 1491 (1994 & Supp. II 1998). The Tucker Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against

> the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States; (2) for a refund from a prior payment made to the government; or (3) based on federal constitutional, or statutory, or regulatory law mandating compensation by the federal government for damages sustained. *See United States v. Testan*, 424 U.S. 392, 400, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976), *reh'g denied*, 425 U.S. 957, 48 L. Ed. 2d 202, 96 S. Ct. 1736 (1976) (citing *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); *see also Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999); *Stinson, Lyons & Bustamante, P.A. v. United States*, 33 Fed. Cl. 474, 478 (1995), *aff'd*, 79 F.3d 136 (Fed. Cir. 1996). A waiver of traditional sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Saraco v. United States*, 61 F.3d 863, 864 (Fed. Cir. 1995) (quoting *United States v. King*, 395 U.S. 1, 4, 23 L. Ed. 2d 52, 89 S. Ct. 1501 (1969)), *cert. denied*, 517 U.S. 1166 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims, "'it does not create any substantive right enforceable against the United States for money damages.'" *United States v. Mitchell*, 445 U.S. 535, 538, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (quoting *United States v. Testan*, 424 U.S. at 398-99), *reh'g denied*, 446 U.S. 992, 64 L. Ed. 2d 849, 100 S. Ct. 2979 (1980); *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1065, 79 L. Ed. 2d 740, 104 S. Ct. 1414 (1984). Individual claimants, therefore, must look beyond the

jurisdictional statute for a waiver of sovereign immunity. *United States v. Mitchell*, 445 U.S. at 538. "In order for a claim against the United States founded on statute or regulation to be successful, the provisions relied upon must contain language which could fairly be interpreted as mandating recovery of compensation from the government." *Cummings v. United States*, 17 Cl. Ct. 475, 479 (1989), *aff'd*, 904 F.2d 45 (Fed. Cir. 1990) (table) (citations omitted); *see also United States v. Mitchell*, 463 U.S. 206, 216-17, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983) (quoting *United States v. Testan*, 424 U.S. at 400 (quoting *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. at 607, 372 F.2d at 1009))); *Tippett v. United States*, 185 F.3d 1250, 1254 (Fed. Cir. 1999) ("The plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.") (quoting *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998), *reh'g denied* (1999); *John Doe v. United States*, 100 F.3d 1576, 1579 (Fed. Cir. 1996), *reh'g denied* (1997); *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) ("Under the Tucker Act, when a cause of action is not based upon breach of contract against the government, the Court of Federal Claims has jurisdiction only over those constitutional provisions, statutes, or regulations that by their terms entitle a plaintiff to money.").

The defendant presents several arguments in support of its partial motion to dismiss the plaintiffs' complaints. First, the defendant argues that the MSPB has exclusive jurisdiction of the plaintiffs' FLEPRA claims for LEO credit. Second, the defendant alleges that the plaintiffs failed to exhaust administrative remedies via the DOJ and the MSPB in their search to be classified as LEOs. Third, the defendant states that only one of the test case plaintiffs, John Partridge, has a FLEPRA section 403 (5 U.S.C. § 5305 note) claim upon which relief can be granted; thus, the other FLEPRA section 403 (5 U.S.C. § 5305 note) claims should be dismissed. Fourth, the defen-

dant argues that FELPRA section 407 (5 U.S.C. § 5305 note) relocation pay is discretionary and, therefore, not a money-mandating statutory provision. Fifth, the defendant asserts that the court lacks jurisdiction to entertain back pay claims which accrued before August 2, 1985, since they are foreclosed by the statute of limitations. Sixth, the defendant argues that the court lacks jurisdiction to entertain plaintiffs' requests for injunctive and/or declaratory relief.

I. FLEPRA Jurisdiction in the United States Court of Federal Claims

The defendant argues that this court lacks jurisdiction to entertain the plaintiffs' claims and that the MSPB has jurisdiction because FLEPRA defines the term "law enforcement officer" as any law enforcement officer within the meaning of the statutory section on premium pay, 5 U.S.C. § 5541(3)(A). Section 5541(3)(A) states that "'law enforcement officer' means an employee who—(A) is a law enforcement officer within the meaning of section 8331(20) or 8401(17)," thereby incorporating the definition of a "law enforcement officer" contained in the retirement statutes. Title 5 U.S.C. § 8331(20) states:

> "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

5 U.S.C. § 8331(20). Title 5 U.S.C. § 8401(17), although formatted differently, similarly states:

> the term "law enforcement officer" means—
>
> (A) an employee, the duties of whose position—
>
> (i) are primarily—

> (I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or
>
> (II) the protection of officials of the United States against threats to personal safety; and
>
> (ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency; . . . .

5 U.S.C. § 8401(17). The defendant suggests that this statutory reliance in FLEPRA upon the definition contained in the retirement statutes requires the plaintiffs to first ascertain "whether they qualify as law enforcement officers for retirement purposes" and that "this issue falls within the exclusive jurisdiction of the MSPB."

The MSPB was created by the Civil Service Retirement Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of title 5 U.S.C.) (CSRA), as part of Congress' comprehensive overhaul of the civil service system. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 773-74, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985). The defendant is correct that whether an employee qualifies for LEO credit for retirement purposes is determined by the employee's agency, with a right of appeal to the MSPB, 5 U.S.C. §§ 1204(a)(1), 7701, 8347(d)(1), 8461(e)(1) (1994), and ultimately to the United State Court of Appeals for the Federal Circuit. See 5 U.S.C. § 7703(b)(1) (1994). The United States Court of Federal Claims, therefore, is not the appropriate authority to determine retirement issues, as that arena of federal employee litigation is within the exclusive jurisdiction of the MSPB and the United States Court of Appeals for the Federal Circuit. See *Lindahl v. Office of Personnel Management*, 470 U.S. at 773-75, 791-99.

The issue currently before the court, however, is not about the plaintiffs' retirement status, but rather about their pay status. The plaintiffs assert that these are not "retirement" cases. According to the plaintiffs these are "pay" cases not only because a significant number of the plaintiffs have never applied for LEO retirement credit, and thus can have no claim at MSPB, but, also because, like those who have applied for retirement credit, all the plaintiffs are entitled to the premium pay afforded by FLEPRA to LEOs. Otherwise stated, the plaintiffs allege that jurisdiction in this court is premised on a statutory right to receive money in cases in which the plaintiffs have been deprived of pay by the federal government under FLEPRA. The explicit incorporation by Congress of the retirement statutes' definition of a "law enforcement officer" into FLEPRA is not a sufficient basis for reading into FLEPRA a requirement that the retirement statutes' review mechanisms through the MSPB must be utilized when reviewing pay issues. Independent of the legislation establishing retirement entitlement, Congress chose a statutory definition of "law enforcement officer" in FLEPRA for pay purposes, without necessarily incorporating the same review provisions. Incorporation of administrative and judicial review provisions must be explicit in a statute, particularly to a forum of limited jurisdiction such as the MSPB.

FLEPRA does not mention an administrative prerequisite to filing a suit for civilian back pay in the United States Court of Federal Claims. See 5 U.S.C. § 5305 note. In contrast, the federal retirement statutes referenced in these cases include explicit provisions articulating the administrative process to be used when filing and reviewing retirement claims. See 5 U.S.C. § 8347(d)(1) (containing provisions for the CSRS which state that "an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board."); 5 U.S.C. § 8461(e)(1) (containing provisions for the

FERS which state that "an administrative action or order affecting the rights or interests of an individual or of the United States under the provisions of this chapter administered by the Office [of Personnel Management] may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.").

The MSPB's jurisdiction is limited. *See, e.g., Walker v. Department of the Navy*, 106 F.3d 1582, 1584 (Fed. Cir. 1997) ("The Board has only that jurisdiction conferred on it by Congress, and the burden of establishing the Board's jurisdiction rests with the petitioner.") (citing *Perez v. MSPB*, 85 F.3d 591, 593 (Fed. Cir. 1996); *Manning v. MSPB*, 742 F.2d 1424, 1426 (Fed. Cir. 1984)); *see also Middleton v. Department of Defense*, 185 F.3d 1374, 1379 (Fed. Cir. 1999) ("The Board's jurisdiction is limited to adverse personnel actions expressly made appealable to it by law, rule, or regulation."). The MSPB has jurisdiction to review agency decisions arising under retirement statutes and cases involving adverse personnel actions under the CSRA. See 5 U.S.C. 7513(d) (1994); 5 C.F.R. § 1201.3(a) (1999). The MSPB, however, does not have jurisdiction to hear cases involving calculation of pay without an underlying adverse action as defined by the CSRA. In the above captioned cases, the plaintiffs have not undergone an adverse personnel action, and they do not seek a claim under the retirement statutes. Instead, the plaintiffs seek overtime compensation and benefits in accordance with FLEPRA.

The defendant relies on the United States Supreme Court's decision in *United States v. Fausto*, 484 U.S. 439, 454, 98 L. Ed. 2d 830, 108 S. Ct. 668, *reh'g denied*, 485 U.S. 972, 99 L. Ed. 2d 448, 108 S. Ct. 1250 (1988), to argue that this court lacks jurisdiction to entertain the plaintiffs' FLEPRA claims. In *United States v. Fausto* the Supreme Court concluded that, after the enactment of the CSRA, "the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an

'appropriate authority' to review an agency's personnel determination." *United States v. Fausto*, 484 U.S. at 454. The Supreme Court determined that the entities possessing the authority to review personnel determinations are the agency itself, the MSPB, and the United States Court of Appeals for the Federal Circuit. *See id*; see also 5 U.S.C. §§ 7513(d), 7703(b)(1) (granting MSPB responsibility for adjudicating employees' appeals from adverse personnel actions, with appellate review available at the United States Court of Appeals for the Federal Circuit). The court concluded that the respondent could not seek review in the United States Claims Court, nor the United States Court of Federal Claims, for a "personnel action of the sort at issue here" (30 day suspension for unauthorized use of a government vehicle). *United States v. Fausto*, 484 U.S. at 455.

Subsequently, the United States Court of Appeals for the Federal Circuit determined that *United States v. Fausto* did not divest the United States Court of Federal Claims of jurisdiction in all instances. *See Bosco v. United States*, 931 F.2d 879 (Fed. Cir. 1991), *aff'd*, 976 F.2d 710, 714 (Fed. Cir. 1992). "The Supreme Court [in *United States v. Fausto*] did not rule that the CSRA provided the only means of judicial review of any actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically covered by the CSRA . . . ." *Bosco v. United States*, 931 F.2d at 883; *see Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994).

The United States Court of Federal Claims, therefore, retains jurisdiction "to hear claims based on a statutory right to receive money where plaintiffs had allegedly been deprived of that money by federal government action . . . except where the underlying personnel action is covered by the CSRA." *Worthington v. United States*, 41 Fed. Cl. 181, 185 (1998), *rev'd on other grounds*, 168 F.3d 24 (Fed. Cir. 1999). "The CSRA encompasses personal [sic] actions

including '(1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less.'" *Abramson v. United States*, 42 Fed. Cl. 326, 332 (1998) (quoting 5 U.S.C. § 7512(1)-(5) (1994)). The plaintiffs in these cases have not suffered an adverse personnel action or any of the actions encompassed by the CSRA.

The decision in *Bradley v. United States*, 42 Fed. Cl. 333 (1998), also clarifies the type of adverse personnel actions that are encompassed by the CSRA. In *Bradley v. United States*, the plaintiffs alleged that the defendant wrongfully reduced the plaintiffs' pay when it retroactively applied the Law Enforcement Availability Pay Act of 1994. *See Bradley v. United States*, 42 Fed. Cl. at 333. The defendant relied on the language of 5 U.S.C. § 5545a(e)(2) which states that "involuntary reduction in pay resulting from a denial of certification . . . shall be a reduction in pay for purposes of section 7512(4) of this title." 5 U.S.C. § 5545a(e)(2); *see Bradley v. United States*, 42 Fed. Cl. at 336. The defendant argued that, because adverse personnel actions as defined by the CSRA include a reduction in pay, the MSPB had exclusive jurisdiction under *United States v. Fausto* over plaintiffs' claims. *See Bradley v. United States*, 42 Fed. Cl. at 336. The United States Court of Federal Claims determined that the defendant's statement of the law was correct, but that it had been misapplied to the facts of the case before the court.

> Plaintiffs did not suffer a reduction in pay as a result of a denial of certification. . . . "There is no dispute that plaintiffs have never lost their certification status, nor have they alleged a denial of certification of availability pay." Pl. Reply (10/22/96) at 2. Thus, plaintiffs' claims are appropriately classified as ones for withholding pay as a result of miscalculation on the part of the government, rather than as claims based on denial of classification.

> In *Chaney v. Veterans Administration*, 906 F.2d 697 (Fed. Cir. 1990), the Federal Circuit held that the MSPB lacked jurisdiction over a claim concerning the calculation of a pay raise. *Id.* at 698. The plaintiff in that case became eligible for pay raises but claimed that the raises were not calculated properly under the law. Id. The court held that MSPB jurisdiction arises only when "an ascertainable lowering, at the time of the personnel action, of an employee's present or future pay occurs." *Id.* at 698 (citing *Garbacz v. United States*, 228 Ct. Cl. 309, 656 F.2d 628 (1981).
>
> As in Chaney, the plaintiffs in this case seek retroactive payments based on an alleged miscalculation or misconstruction of applicable legislation. The reduction in pay which plaintiffs allege is not an adverse personnel action as contemplated in the CSRA. Plaintiffs' claims are merely for unpaid salary for time actually worked.

Bradley v. United States, 42 Fed. Cl. at 336. Just as in Chaney v. Veterans Administration and *Bradley v. United States*, the plaintiffs' claims in these cases are for "unpaid salary for time actually worked." *Id.* The plaintiffs do not allege entitlement as a result of a mistaken adverse personnel action, but seek overtime compensation, and/or premium pay under FLEPRA, for work they completed as DIs. As the CSRA does not cover such claims, the MSPB does not have jurisdiction over those claims.

Moreover, in *Bosco v. United States*, the United States Court of Appeals for the Federal Circuit stated that there was a lack of "any evidence in the [CSRA's] legislative history that the Congress was seeking to streamline the civil service by abrogating judicial review rights for personnel actions unrelated to an individual's performance." *Bosco v. United States*, 976 F.2d at 715; *see also Romero v. United States*, 38 F.3d at 1211; *Holley v. United States*, 124 F.3d at 1466-67. The distinction that Congress articulated in the Technical and

Miscellaneous Civil Service Amendments Act of 1992, when defining the term "law enforcement officer" in the premium pay statutes incorporated in FLEPRA, is critical to a determination of jurisdiction: "It is the sense of the Congress that—(i) the provisions of section 5541(3) of title 5, United States Code (as added by section 2(40)(C) of this Act)—(I) are enacted only for the purposes of pay and not for the purposes of retirement." Pub L. No. 102-378, § 2(40)(D), 106 Stat. 1346 (found at 5 U.S.C. § 5541 note (1994)). This certainly does not suggest, as the government argues, that the Congress intended to submit FLEPRA claims to the administrative process mandated in the retirement statutes. Instead, this court holds that the pay provisions of FLEPRA that do not relate to adverse personnel actions are outside the purview of the retirement process, and, for cases arising pursuant to those provisions, jurisdiction is properly vested in the United States Court of Federal Claims. The defendant's motion to dismiss premised upon the argument that this issue falls within the exclusive jurisdiction of the MSPB is denied.

II. Exhaustion of Administrative Remedies

The defendant also argues that plaintiffs' claims are "premature because they have yet to exhaust their administrative remedies." The plaintiffs respond by noting that "since there is no statute mandating any administrative remedy for the plaintiffs' FLEPRA claims, the question whether they must exhaust is committed to the sound discretion of the Court as governed by the principles set out by the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140, 144, 147-49, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992)."

"The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decisionmaking." *McCarthy v. Madigan*, 503 U.S. at 144. The doctrine is well established in the jurisprudence of administrative law, *McKart v. United States*, 395 U.S. 185, 193, 23

L. Ed. 2d 194, 89 S. Ct. 1657 (1969), and provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 82 L. Ed. 638, 58 S. Ct. 459 (1938); accord *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998); *Burlington N. R.R. Co. v. United States*, 752 F.2d 627, 629 (Fed. Cir. 1985).

When deciding whether to require exhaustion of administrative remedies, the court first looks to congressional intent as expressed in the statute. *See McCarthy v. Madigan*, 503 U.S. at 144; *see also Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501, 73 L. Ed. 2d 172, 102 S. Ct. 2557 -502 (1982). "Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. at 144 (citations omitted); accord *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).[4]

The mandate that a plaintiff exhaust all administrative remedies prior to instituting a lawsuit in this court is intended to "serve[] the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. at 145. In other words, the doctrine seeks to affirm the authority Congress has given administrative agencies to administer programs or interpret

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[4] Cf. *Darby v. Cisneros*, 509 U.S. 137, 154, 125 L. Ed. 2d 113, 113 S. Ct. 2539 (1993) ("Where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under 10(c) [of the APA]."). The court also wrote: "Of course, the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA." *Id.* at 153-54. The instant cases are not governed by the APA.

statutes. *McCarthy v. Madigan*, 503 U.S. at 145. In addition, it promotes judicial efficiency by mooting judicial controversies that can be decided by the agency with special expertise, providing a useful record for controversies that cannot, and avoiding "piecemeal appeals." *McCarthy v. Madigan*, 503 U.S. at 145.

However, "'administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.'" *McCarthy v. Madigan*, 503 U.S. at 146 (quoting *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979), *cert. denied*, 449 U.S. 821, 66 L. Ed. 2d 23, 101 S. Ct. 79 (1980)). Individual litigant's interests weigh against exhaustion in three broad circumstances. First, requiring exhaustion of the administrative remedy may prejudice the plaintiff. *Maggitt v. West*, 202 F.3d at 1377 (citing *McCarthy v. Madigan*, 503 U.S. at 146-48). "Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. at 147. In *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973), although discussing state administrative remedies, the United States Supreme Court wrote: "State administrative remedies have been deemed inadequate by federal courts and hence not subject to the exhaustion requirement . . . most often . . . because of delay by the agency . . . ." Such delay is not characterized by any specific time limit in which to respond to claims. *See, e.g., Walker v. Southern Ry. Co.*, 385 U.S. 196, 198, 17 L. Ed. 2d 294, 87 S. Ct. 365 (1966), *reh'g denied*, 385 U.S. 1020, 17 L. Ed. 2d 559, 87 S. Ct. 699 (1967) (holding that plaintiffs are not required to wait ten years or more on the administrative board to decide their claim); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591, 70 L. Ed. 747, 46 S. Ct. 408 -592 (1926) (finding that an injured public service company "is not required

indefinitely to await a decision of the rate-making tribunal before applying to a federal court . . . .").

Second, the administrative remedy may be inadequate because, even if an agency can adjudicate the issue presented, it may not have authority to grant the type of relief requested. *McCarthy v. Madigan*, 503 U.S. at 147 (citing *Gibson v. Berryhill*, 411 U.S. at 575 n.14; *see also McNeese v. Board of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963) (finding that student plaintiffs did not have to exhaust administrative remedies when the school superintendent did not have authority to grant the requested relief).

Third, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. at 148 (citing *Gibson v. Berryhill*, 411 U.S. at 575 n.14; *Houghton v. Shafer*, 392 U.S. 639, 640, 20 L. Ed. 2d 1319, 88 S. Ct. 2119 (1968)). For example, the United States Supreme Court in *Houghton v. Shafer* held that it would be futile to require the petitioner to exhaust the administrative remedy of appeal to the Attorney General of Pennsylvania, or another officer, in light of the Attorney General's submission that the rules were "validly and correctly applied to petitioner" and "strictly enforced throughout the entire correctional system . . . ." Houghton v. Shafer, 392 U.S. at 640.

The plaintiffs are correct in stating that "since there is no statute mandating any administrative remedy for the plaintiffs' FLEPRA claims, the question whether they must exhaust is committed to the sound discretion of the Court as governed by the principles set out by the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140, 144, 147-49, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992)." As previously noted, FLEPRA does not mention an administrative prerequisite to filing a suit, in contrast to the federal retirement statutes

which have explicit provisions for the administrative process to file and review claims. See 5 U.S.C. § 8347(d)(1); 5 U.S.C. § 8461(e). Given that Congress has not explicitly required exhaustion of administrative remedies for claims under FLEPRA, this court has discretion to determine if exhaustion should be required by evaluating whether the plaintiff's interests in having access to a judicial forum outweigh the government's interest in administrative autonomy. *See McCarthy v. Madigan*, 503 U.S. at 144, 146.

This court finds that requiring the plaintiffs to exhaust administrative channels could cause further prejudice to plaintiffs' attempts to obtain relief because of the "unreasonable" and "indefinite timeframe" of DOJ's and DEA's administrative remedial mechanisms. *See McCarthy v. Madigan*, 503 U.S. at 147. Several plaintiffs submitted their applications for retroactive LEO retirement credit to the DEA and/or JMD as early as June of 1989. The majority of the claims were filed over the course of the next several years. During that time, despite this court's frequent urging to the defendant to resolve the plaintiffs' claims on the administrative level, and stays of proceedings of the cases in this court in response to requests from the parties to await the outcome of retirement claims at the DOJ and the MSPB, the defendant still has not resolved most of the pending claims.

Of the 145 DIs who have applied for retroactive LEO retirement credit, nine DIs received final JMD orders in 1995 denying their applications. All nine DIs appealed the JMD decisions to the MSPB and their cases were consolidated with two designated cases proceeding on appeal (Hannon and Townsend). As noted above, in 1997, MSPB Administrative Judge Jenkins issued an order reversing JMD's decisions in the two designated cases. DOJ successfully appealed Judge Jenkins' decision to the MSPB, which issued two final decisions in June and August of 1999 denying LEO retirement credit to the two plaintiffs. The remaining seven

plaintiffs' claims for LEO retirement credit were stayed at the MSPB pending the resolution of two pending appeals at the United States Court of Appeals for the Federal Circuit. In a status report to this court, the defendant claims that, as of August 20, 2000, the JMD had issued final decisions on 65 additional applications, or a total of 74 of the 145 applications. The plaintiffs, however, only can confirm that the JMD has issued 52 decisions. If the plaintiffs are correct, two thirds of the applicants are still awaiting a final administrative decision from the JMD. Even if the defendant could show that all of the alleged 74 JMD decisions indeed overlap with plaintiffs in this court, more than one half of the claims filed still remain to be resolved administratively. As noted, this delay has occurred despite repeated urging to the defendant to resolve these applications internally and expeditiously. This court finds that the DOJ's inability to address administratively the plaintiffs' claims with the agency has negatively impacted the plaintiffs. For an extensive period of time, the DOJ has had an opportunity to address the pending applications filed by 145 of the plaintiffs in this case. Instead, the DOJ has delayed resolving these matters in a timely fashion. Although patient, the plaintiffs in some instances have been in bureaucratic limbo for over ten years. As noted previously, the United States Supreme Court supports a judge's decision not to mandate exhaustion in the wake of prejudicial and inexplicable administrative delay. *See Gibson v. Berryhill*, 411 U.S. at 575 n.14.

The court also finds that it should not require the plaintiffs to exhaust administrative channels in these cases because of the likely futility of such pursuits. The DOJ and DEA have a predetermined position regarding the issue of LEO credit for DI's. In the instant lawsuits, the DEA and its DOJ counsel have adopted the firm position that DI's are not entitled to FLEPRA compensation and benefits that are granted to LEOs under the act. The DOJ position was evident from early in the related lawsuits in the defendant's answer to the plaintiffs'

complaints in the original nine cases filed in this court. Furthermore, although the parties disagree as to the number of decisions issued to date, the parties do agree that all decisions issued by the DOJ have denied LEO retirement credit to the applicants. Moreover, as indicated above, during the proceedings at the MSPB in the cases of James T. Hannon and Ronald J. Townsend, DEA and its DOJ counsel took firm positions opposing plaintiffs' application for LEO retirement credit, which position they continued to firmly advance in the appellate proceedings in the United States Court of Appeals for the Federal Circuit. Thus, it is fair to conclude that requiring the plaintiffs to seek an administrative remedy from the DOJ would be futile. The defendant's motion to dismiss premised upon the argument that the plaintiffs have failed to exhaust administrative remedies is, therefore, denied.

III. Defendant's Other Grounds for Partial Dismissal

The defendant claims that the court should dismiss all but John Partrige's FLEPRA section 403 (5 U.S.C. § 5305 note) claim for failure to state a claim upon which relief can be granted. Since plaintiff John Partrige is the only party seeking FLEPRA section 403 (5 U.S.C. § 5305 note) compensation, the parties are in agreement on this issue, thus rendering the issue moot.

The defendant argues that FLEPRA section 407 (5 U.S.C. § 5305 note) relocation pay is discretionary and, therefore, not a money-mandating statutory provision. In response, the plaintiffs note that such a decision would be dependent upon the court's conclusion as to whether the plaintiffs qualified as LEOs. The court is in agreement with the plaintiffs that it is premature for the court to address the FLEPRA section 407 (5 U.S.C. § 5305 note) issue, until there has been a determination as to whether DIs meet the definition of an LEO.

The defendant also argues that a number of the plaintiffs' claims under the Back Pay Act are barred by the six-year

statute of limitations. In the pleadings and at the oral argument, plaintiffs' counsel conceded that the plaintiffs are aware of the six-year statute of limitations period established by 28 U.S.C. § 2501, and that, therefore, the plaintiffs "do not seek reimbursement for unpaid administratively uncontrollable overtime compensation for any period before August 2, 1985." Thus, with this agreement by the parties, the statute of limitations issue is moot, and any claims for compensation prior to August 2, 1985 are dismissed.

In addition, the defendant contends that the plaintiffs seek injunctive and/or declaratory relief. At the oral argument it was determined that, in fact, the plaintiffs' seek "entitlement to back pay" and not injunctive and/or declaratory relief. This was agreed to by both parties at the oral argument, therefore mooting this issue as raised in the defendant's partial motion to dismiss.

CONCLUSION

For the reasons discussed above, the defendant's partial motion to dismiss for lack of jurisdiction and/or for failure to state a claim upon which relief can be granted is, hereby, DENIED.

IT IS SO ORDERED.

MARIAN BLANK HORN, *Judge*

Supreme Court, U.S.
FILED
OCT 28 2005
OFFICE OF THE CLERK

No. 05-147

In the Supreme Court of the United States

JOHN D. CROWLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner is not a "law enforcement officer" within the meaning of the Federal Law Enforcement Pay Reform Act of 1990, Pub. L. No. 101-509, §§ 401-407, 104 Stat. 1465-1467 (5 U.S.C. 5305 note), which incorporates the definition contained in the civil service retirement statute, 5 U.S.C. 8331(20).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 398 F.3d 1329. The opinions of the United States Court of Federal Claims (Pet. App. 26a-39a, 40a-54a, 55a-173a, 174a-200a) are reported at 57 Fed. Cl. 376, 56 Fed. Cl. 291, 53 Fed. Cl. 737, and 48 Fed. Cl. 15.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2005. A petition for rehearing was denied on April 27, 2005 (Pet. App. 25a). The petition for a writ of certiorari was filed on July 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Law Enforcement Pay Reform Act of 1990 (FLEPRA), Pub. L. No. 101-509, §§ 401-407, 104 Stat. 1465-1467 (5 U.S.C. 5305 note), entitles a federal "law enforcement officer" (LEO) to special pay benefits, including supplemental pay for working in selected cities. 5 U.S.C. 5305 note (FLEPRA § 404, 104 Stat. 1466). An employee may qualify for LEO special pay benefits in one of two ways: (1) by serving in a position that is formally designated as an LEO position; or (2), if the employee does not occupy such a position, by asking his employer to recognize that he nonetheless qualifies for LEO status. 5 C.F.R. 831.903-831.906. An employee who applies for LEO special pay benefits bears the burden of proving that he qualifies as an LEO. 5 C.F.R. 831.906(a); see Pet. App. 19a n.11.

To qualify as an LEO under FLEPRA, a federal employee in the Civil Service Retirement System (CSRS) must meet the definition of "law enforcement officer" contained in the civil service retirement statute. See 5 U.S.C. 5541(3)(A) (incorporating 5 U.S.C. 8331(20)). That CSRS statute defines "law enforcement officer" as:

> an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

5 U.S.C. 8331(20).

The Office of Personnel Management (OPM) has promulgated regulations elaborating on this definition. See 5 U.S.C. 8347(a). The regulations specify that an LEO

"does *not* include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States." 5 C.F.R. 831.902 (emphasis added).

In addition, the Merit Systems Protection Board (MSPB)—which adjudicates disputes over whether employees qualify for LEO special retirement benefits—has extrapolated from the statutes and regulations various factors that it has determined illuminate the inquiry whether an employee meets the statutory definition of an LEO. As the Federal Circuit has explained:

> According to the Board, [an LEO] within the statutory contemplation commonly (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness.

Bingaman v. *Department of Treasury*, 127 F.3d 1431, 1436 (Fed. Cir. 1997); see Pet. App. 12a-13a. The Board also "consistently has recognized * * * that hazard is a significant element of law enforcement work." *Hannon* v. *DOJ*, 234 F.3d 674, 679 (Fed. Cir. 2000) (citing MSPB decisions), cert. denied, 534 U.S. 1065 (2001). The Federal Circuit has observed that the Board's factors capture "the essence of what Congress intended." *Ibid.* (quoting *Bingaman*, 127 F.3d at 1236).

Subsequent to *Bingaman*, the MSPB adopted an approach of more affirmatively examining the reasons

for the creation and existence of the employee's position, in addition to the employee's actual duties. See *Watson* v. *Department of the Navy*, 262 F.3d 1292, 1297 (Fed. Cir. 2001), cert. denied, 534 U.S. 1083 (2002). In *Watson*, the Federal Circuit agreed with the MSPB that this position-oriented approach was "more faithful to the language of the statutes and the regulations," which refer specifically to the "position" at issue. *Id.* at 1297, 1299. In so doing, *Watson* identified the five "most probative" factors in determining whether the statutory definition of LEO is met:

> 1) whether the officers are merely guarding life and property or whether the officers are instead more frequently pursuing or detaining criminals; 2) whether there is an early mandatory retirement age; 3) whether there is a youthful maximum entry age; 4) whether the job is physically demanding so as to require a youthful workforce; and 5) whether the officer is exposed to hazard or danger.

Id. at 1303. The Federal Circuit noted that the *Bingaman* factors "may also be considered as necessary and appropriate." *Ibid.* Thus, as the decision below recognized, "*Watson* marked a further step in the evolution of the case-by-case framework first adopted in *Bingaman*." Pet. App. 13a.

2. a. Petitioner served as a diversion investigator for the Drug Enforcement Administration (DEA) within the United States Department of Justice (DOJ), and in subsequent supervisory or administrative positions. See Pet. App. 4a-5a, 57a; see also *id.* at 5a n.5 (explaining that "[i]n order to qualify for supplemental pay under the FLEPRA, [petitioner] must show that he served in a primary LEO position and was properly transferred

from that position to a valid secondary (administrative or supervisory) LEO position"). The work of a DEA diversion investigator involves the investigation of the diversion of legal but controlled substances from legitimate channels of commerce to illegal ones. *Id.* at 4a. The work involves inspections of manufacturers and distributors of controlled substances to assure compliance with the Controlled Substances Act, 21 U.S.C. 801 *et seq.* Pet. App. 4a. Diversion investigators also may participate in criminal investigations; under agency policy, however, they cannot carry firearms, execute arrest or search warrants, participate in undercover activities of any kind, direct or pay informants, or conduct moving surveillance. *Ibid.* In addition, at the time petitioner served, diversion investigators had no physical fitness requirements, age requirements, or agency-imposed obligations to be on call 24 hours a day. *Ibid.*

The position of a DEA diversion investigator is not formally designated as an LEO position, but petitioner applied to DOJ for LEO status on the ground that he qualified as an LEO under the CSRS. In 1999, DOJ denied petitioner's claim that he served as an LEO (or in qualifying secondary positions) between October 1, 1991, and June 15, 1997. Pet. App. 6a.

b. Petitioner filed a complaint with the MSPB for LEO retirement credit and, concurrently, a complaint in the Court of Federal Claims to recover supplemental pay under FLEPRA for the period from October 1, 1991, to October 1, 2001. Pet. App. 6a. Before the MSPB determined petitioner's retirement claims, the Court of Federal Claims issued a decision following trial reversing DOJ's determination that petitioner did not serve as an LEO. *Id.* at 55a-173a. The court thus concluded that petitioner was entitled to supplemental

pay under FLEPRA Section 404 from January 1, 1992, to April 1, 2001, *id.* at 173a, plus interest under the Back Pay Act of 1966, 5 U.S.C. 5596. Pet. App. 39a.

3. The Federal Circuit reversed. Pet. App. 2a-23a.[1] The court of appeals reviewed the evolution of its precedent interpreting the statutory definition of "law enforcement officer." *Id.* at 12a-15a (discussing *Bingaman*, *Hannon*, *Watson*, *Hall* v. *Department of the Treasury*, 264 F.3d 1050 (Fed. Cir. 2001), and *Koenig* v. *Department of the Navy*, 315 F.3d 1378 (Fed. Cir. 2003)). The court of appeals reaffirmed that the analytical approach adopted in *Watson*—consideration of the reasons for the creation and existence of the employee's position as well as the individual facts of each employee's actual duties—was consistent with the language of the statute. *Ibid.* In so doing, the court explained that the factors set forth in its prior decisions to assist in determining whether a particular position satisfied the statutory definition of an LEO could be synthesized into "two main considerations": (1) "the physical vigorousness required by the position in question" and (2) "the hazardousness of a position," although it observed that "[h]azard, while important, is secondary to physical vigorousness." *Id.* at 16a-17a. The court reiterated that, even if a position fails to qualify for LEO status, the employee nevertheless may be able to demonstrate that his actual duties in fact qualify for LEO status. *Id.* at 20a.

Applying that carefully developed framework to the facts of this case, the Federal Circuit concluded that petitioner did not satisfy the definition of an LEO. Pet. App. 20a-23a. The Federal Circuit concluded that the

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[1] The Federal Circuit affirmed the trial court's conclusion that it had jurisdiction over petitioner's FLEPRA claims. Pet. App. 8a-11a.

position of diversion investigator had no strenuous physical fitness requirements, no maximum entry level age requirement or mandatory retirement age, and no official requirement that diversion investigators be on call 24 hours a day. *Id.* at 21a-22a. The court also concluded that "there is little in the official duties of a [diversion investigator] that would incline us to find the position to be hazardous in nature." *Id.* at 22a. The court noted that it was undisputed that employees occupying the position were not authorized to carry a firearm and that there was no evidence that the position existed for the purpose of pursuing and detaining criminals. *Ibid.* The court further observed that nothing in the position description for diversion investigators mentions requirements for contact with or interrogations of criminal suspects; agency policy specifically led diversion investigators away from activity that would tend to lead to contact with criminals and suspects; and anecdotal contacts with criminals were insufficient to show that petitioner's position required frequent and consistent criminal contact. *Id.* at 22a & n.14. Finally, the Federal Circuit concluded that petitioner had failed to establish that his "actual duties conflict[ed] with his job description to the extent required to gain LEO status." *Id.* at 23a.

ARGUMENT

The court of appeals properly concluded that petitioner does not qualify for LEO supplemental pay. The court of appeals' unanimous decision does not conflict with any decision of this Court or any other court of appeals, or with any other decision of the Federal Circuit. This Court recently denied a petition for a writ of certiorari that sought review of a substantially similar question. See *Hannon* v. *DOJ*, 234 F.3d 674 (Fed. Cir. 2000),

cert. denied, 534 U.S. 1065 (2001) (No. 01-372).[2] Further review is not warranted in this case either.

1. Petitioner's central contention (Pet. 6) is that the court of appeals has "strayed from the plain language of the statute" in determining an employee's eligibility for LEO status. In particular, petitioner objects (Pet. 9) to the court of appeals' consideration of the factors developed by the Federal Circuit and the MSPB to assist in determining whether the statutory definition of LEO is met. That contention is without merit.

The purpose of the factors in adjudicating claims to LEO status is to assist the finder of fact in determining when the statutory definition is met, not to displace that definition. The factors articulated in *Bingaman*, which were first identified by the MSPB, were "extrapolated from the statutory and regulatory language, in light of the legislative history" and "capture[] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; see *Hobbs* v. *OPM*, 58 M.S.P.R. 628, 632 (1993) (discussing legislative history). As the court of appeals has explained, the *Bingaman* factors "were not set forth as a substitute for the statute, but rather as a framework for the factual inquiry needed to ascertain coverage under the statutory scheme." *Hall*, 264 F.3d at 1056; Pet. App. 13a. Similarly, in *Watson*, the court of appeals approved the position-oriented approach of the MSPB because it was "consistent with the statutory * * * criteria for LEO retirement credit" and the "legislative intent in providing for the LEO retirement program" and was adopted "[i]n order to be more faithful to the language of the statutes." 262 F.3d at 1297, 1299. As the Federal Cir-

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[2] See also *Watson* v. *Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001), cert. denied, 534 U.S. 1083 (2002) (No. 01-725).

cuit explained in this case, the *Watson* approach "is more in keeping with the original language of the relevant statutes than an analysis of an employee's actual duties." Pet. App. 15a. Thus, while discussing and synthesizing the factors set forth in its precedent, the court below recognized that the statutory definition remains the touchstone for determining whether an employee qualifies for LEO status. See *id.* at 11a, 16a-19a, 23a.

The consideration of certain factors in deciding whether the statutory definition is met is especially appropriate when the court is faced with close and quintessentially fact-bound questions as to the nature of a particular position and the duties of individual employee-claimants occupying that position. DEA diversion investigators do not qualify as LEOs within the meaning of the statutory definition established by the CSRS. And the use of relevant factors as general guidelines for giving effect to the statutory definition helps to ensure that federal employees who Congress intended to be LEOs are granted such status and that others are not improperly awarded such status.

Petitioner suggests (Pet. 15) that the Federal Circuit's case law in this area is "muddled." That is incorrect. The Federal Circuit has carefully monitored and refined the criteria that it applies in determining whether the statutory definition has been met. There is no conflict in the circuits on this issue, nor even in the Federal Circuit's own decisions. And there is no need for this Court to undertake plenary review of this issue.

2. Petitioner claims (Pet. 11) that the legislative history of the civil service retirement statutes provides "no support" for the decision below. That is incorrect. The legislative history indicates that Congress intended LEO positions to be occupied by "young men and women

physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 948, 93d Cong., 2d Sess. 2 (1974)); Pet. App. 16a (same); see *Hobbs*, 58 M.S.P.R. at 632. At the same time, the interpretation urged by petitioner (Pet. 10)—that an employee may qualify as an LEO simply by demonstrating that he spends a majority of his time participating in criminal investigations, without regard to the nature of the activities performed in connection with those investigations—could extend LEO supplemental pay and retirement benefits to a broad class of employees such as chemists, laboratory technicians, paralegals and secretaries in prosecutors' offices, and others who do not perform strenuous, frontline law enforcement duties. There is no evidence—in the legislative history, much less the statute—that Congress intended to include such employees within the statutory definition of LEOs.

Petitioner claims (Pet. 10-11) that 5 U.S.C. 5545a(a)(2), which contains a statutory definition of the term "criminal investigator," is "the best place to look for clarification" of what constitutes LEO status. Not so. Section 5545a(a)(2) defines those LEOs who are also "criminal investigators." Because LEO status is a necessary predicate for a criminal investigator under Section 5545a(a)(2), the definition of "criminal investigator" does not address the requirements for LEO status. Rather, it addresses the specific requirements, *in addition* to LEO status, necessary to meet the statutory definition of "criminal investigator."

Petitioner suggests (Pet. 8) that the court of appeals erred in concluding that the degree of hazard faced by petitioner is a proper factor to consider in determining

whether he met the statutory definition. First, the court of appeals determined that petitioner was not an LEO without regard to the degree of hazard he faced. Pet. App. 22a. Second, the court of appeals, and the MSPB, have recognized on numerous occasions that "hazard is a significant element of law enforcement work." *Hannon*, 234 F.3d at 679 (citing MSPB cases); see *Watson*, 262 F.3d at 1303; *Hall*, 264 F.3d at 1058. In *Hannon*, the Federal Circuit completely reviewed the legislative history of the retirement statutes and concluded that "[n]othing in this history shows, or even suggests, that Congress intended to prohibit consideration of hazard in determining law enforcement officer status." 234 F.3d at 680.[3]

Petitioner also asserts (Pet. 12-13) that the court of appeals "erred in refusing to defer" to OPM's regulations implementing the statutes at issue. That is incorrect. Nothing in the court of appeals' decision in this case is inconsistent with the regulations implementing the civil service retirement statutes. Moreover, in a regulation implementing 5 U.S.C. 8401(17), the retirement statute under the Federal Employees Retirement System (FERS), which is parallel to 5 U.S.C. 8331(20), OPM

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[3] Petitioner relies (Pet. 8, 11-12 & n.32) on *Obremski* v. *OPM*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983), in challenging the Federal Circuit's consideration of the hazard posed by a position. The footnote cited by petitioner relies upon a portion of a floor speech made by Congressman Daniels, who stated that enhanced retirement benefits included in the 1974 Amendments were not a "reward" for performing hazardous duties. 119 Cong. Rec. 30,596 (1973). Daniels' statement emphasizes that the *reason* for providing early retirement to LEOs was not to reward them for hazardous duty, but rather to encourage early retirement because it typically becomes more difficult to perform hazardous duties as one ages. Daniels began that portion of his speech by stating that "the element of hazard was, and is, recognized." *Ibid.*

provided that, to meet the FERS's definition of an LEO, an employee's duties must be "so rigorous" that they should "be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

3. Petitioner's disagreement (Pet. 13-16) with the Federal Circuit's decision in *Watson*, is misplaced and in any event provides no reason to review the decision below. The Federal Circuit here approved of the *Watson* position-oriented approach, also used by the court in *Koenig*, because it agreed with the MSPB that the approach is more in keeping with the original language of the relevant statutes than an analysis of an employee's actual duties. Pet. App. 15a (citing *Watson* v. *Department of the Navy*, 86 M.S.P.R. 318, 320-321 (2000)).

Petitioner claims (Pet. 7) that, in *Watson*, the Federal Circuit "recognized the infirmity of [the] *Bingaman/Hannon* approach." To the contrary, the *Watson* Court recognized that the MSPB's position-oriented approach is "wholly consistent with the approach taken by this court in *Bingaman*," and that those factors may still be considered. 262 F.3d at 1301; see Pet. App. 15a-16a. Moreover, as was the case in *Watson*, 86 M.S.P.R. at 321, the court of appeals here emphasized that "notwithstanding the absence of a described LEO position," the employee may nevertheless attempt to demonstrate that there is a "conflict between the description of the position and the real-life facts of occupying the position." Pet. App. 20a.

4. Petitioner also claims (Pet. 16-17) that the court of appeals applied the wrong standard of review. That is incorrect and in any event presents no question warranting this Court's review. As the court of appeals correctly stated, "[l]egal analysis involving the application of law to the facts is a legal question that is reviewed de

novo." Pet. App. 8a (citing *Litton Indus. Prods., Inc.* v. *Solid State Sys. Corp.*, 755 F.2d 158, 164 (Fed. Cir. 1985)); *ibid.* ("We review the Court of Federal Claims' conclusions of law de novo and all of its findings of fact for clear error."). Applying this standard, the court of appeals concluded that the trial court failed to properly apply the law to the facts. See, *e.g.*, *id.* at 21a (concluding that the trial court "failed to find that [petitioner's] *position* had any strenuous physical fitness requirement" and improperly relied upon incidental physical labor as satisfying the physical fitness requirement).

In this case, the Federal Circuit determined that, based on its review of all the evidence, petitioner had not established that his position met the statutory definition of an LEO. Among other things, the court explained that "nothing in [petitioner's] position description or in any of the official documentation regarding his position articulated a physical fitness requirement," Pet. App. 21a; "[petitioner's] position did not authorize him to carry a firearm," *id.* at 22a; "there is no evidence that [petitioner's] position existed for the purpose of pursuing and detaining criminals," *ibid.*; "nothing in [petitioner's] position description mentions any requirements for contact with or interrogation of criminal suspects," *ibid.*; and, because "it has not been established by a preponderance of the evidence that fifty percent or more of [petitioner's] actual duties were LEO duties," *id.* at 23a, petitioner "cannot show that his actual duties conflict with his job description to the extent required to gain LEO status." *Ibid.* That highly factbound determination is correct and does not warrant further review in this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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